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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TANA WOOD, ALAN WALTER, GARY EDWARDS, JULIUS VAN SKIKE, WAYNE HELGESON, TERRENCE LAWSON, RICH ALT,

Petitioners,

v.

NORMAN GOTCHER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Heck v. Humphrey*, 512 U.S. ___, 114 S. Ct. 2364 (1994) this Court held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of confinement and that a prisoner may not bring an action for damages under 42 U.S.C. § 1983 if it would necessarily imply the invalidity of the prisoner's conviction or sentence.

Does this Court's ruling in *Heck v. Humphrey* bar a § 1983 action brought by a prisoner challenging prison disciplinary procedures under the Due Process Clause that would necessarily imply the invalidity of the prisoner's loss of good time?

2. Do prisoners have a state created liberty interest in avoiding a loss of good-time credits, even though prison officials impose this disciplinary sanction in response to a broad range of misconduct in their day-to-day management of the prison?

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Petitioners respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 66 F.3d

1097 (9th Cir 1995). App. A. The district court's opinion is unreported. App. D.

II. JURISDICTION

The Ninth Circuit entered judgment on October 4, 1995, App. A, and denied a timely petition for rehearing and suggestion for rehearing *en banc* on November 27, 1995, App. F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the Fourteenth Amendment of the Constitution, 28 U.S.C. § 2254(b), and 42 U.S.C. § 1983 are reprinted in App. K. The statues, regulations, and policies governing Washington's disciplinary system are set forth in Apps. H, I, L, M. and N.

IV. STATEMENT OF THE CASE

A. Washington's Prison Disciplinary System.

In 1984, Washington began convicting individuals under a system of determinate sentencing. Under this system, prisoners are incarcerated without any opportunity for parole prior to the expiration of their maximum sentences. The sentencing statutes contain a general prohibition against early release:

> **Leaving correctional facility or release before expiration of sentence prohibited– Exceptions.** No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence . . .

Wash. Rev. Code § 9.94A.150, App. M. To assist in the management of the prison population, the legislature directed prison officials to design and implement a disciplinary system which provides prisoners with "incentives for good conduct and disincentives for poor conduct". Wash. Rev. Code § 72.09.130, App. N. As a result, Washington prison officials have developed and enforce a prison disciplinary code, violations of which will result in a number of sanctions, including a loss of good-time credits. Chapter 137-28 Washington Administrative Code (WAC), App. H.[1]

Good-time credits are defined as "that portion of an inmate's potential reduction to his/her minimum term . . . which is gained by not receiving serious infractions as listed in WAC 137-28-030." Wash. Admin. Code § 137-28-006(6), App. H.

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[1]The general policy regarding good-time credits, DOC 350.100, states that its purpose is: "To establish a system of incentives to be awarded to offenders as a means of assisting in the management of Department of Corrections facilities." App. L. Consistent with this purpose, Wash. Rev. Code § 9.94A.150(1) recognizes a possible exception to the rule against early release for those inmates who earn good-time credits and do not engage in further misconduct prior to their good-time release date. *Id.* (Providing that "the term of the sentence of an offender . . . may be reduced by earned early release time"), App. M.

Prisoners who may have accrued good-time credits may not rely on those credits for an early release. If the disciplinary code has been violated, prison officials may withdraw the credits even though the prisoner may have been scheduled for release the next day.

Washington prison officials use loss of good-time credits to maintain prison discipline. This loss is a normal incident of prison life, as prison officials can withhold good-time credits in response to a wide range of prison misconduct. Although identified as "serious", prison officials have defined a broad range of misconduct that will result in loss of good-time credits. Wash. Admin. Code § 137-28-030, App. H.[2] A category of general misconduct can result in sanctions without a loss of good-time credits. *See* Wash. Admin. Code § 137-28-025, App. H. The Legislature has in no way limited the discretion of prison officials to determine which types of misbehavior result in a loss of good-time credits. Department of Corrections officials could amend these rules to permit loss of good-time credits for both serious and general misconduct. Moreover, superintendents are currently free to define additional types of misconduct, beyond serious and general, sanctionable with loss

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[2]In Washington, approximately 40 types of misconduct may receive this sanction, including throwing objects at others (508), lying to a hearing officer (551), destroying property in excess of five dollars (554), refusing to submit to urinalysis (607), and possession of an unauthorized tool (702). App. H.

of good-time credits. Wash. Admin. Code § 137-28-010, App. H.

B. The Prison Disciplinary Proceeding.

A Washington court convicted and sentenced Respondent, Norman Gotcher, Jr., to a determinate sentence. Mr. Gotcher served much of his sentence at the Washington State Penitentiary (WSP).

In September of 1992, prison officials charged Mr. Gotcher with violations of the prison disciplinary code. App. J-2. According to prison officials, Mr. Gotcher intimidated a female staff member by brushing up against the side of her body while she was notarizing and copying documents for Mr. Gotcher. Although directed to step back, Mr. Gotcher again brushed up against the woman, and made inappropriate comments about other female staff members. App. J-2.

At a disciplinary hearing held on September 16, 1992, the hearing officer found Mr. Gotcher guilty of threatening, and other lesser infractions.[3] Mr. Gotcher received a sanction of 20 days in segregation and a loss of 30 days good-time credits. App. J-2.

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[3]Prison officials have defined "threatening" as "threatening another with bodily harm or with any offense against his/her person." WAC 137-28-030 (506), App. H.

C. Course of Proceedings.

On October 13, 1993, the district court ordered service of Mr. Gotcher's second amended complaint. App. G. In his complaint, Mr. Gotcher challenged the constitutionality of the disciplinary hearing held on September 16, 1992. Much of the complaint was confusing and difficult to understand. Although Mr. Gotcher did not detail the specific relief that he wanted, he did allege that he was "Seeking Money Damages, Declaratory Judgment, and Injunctive Relief." App. G-1.

On April 26, 1994, the district court granted the Petitioners' motion to dismiss Mr. Gotcher's lawsuit for failure to state a claim. App. C. The district court agreed with Petitioners' argument that the Due Process Clause itself does not give rise to a liberty interest in avoiding the prison disciplinary sanctions, and that Washington had not created such a liberty interest in its system of incentives and disincentives for prisoner behavior. App. C-6 to C-9.

Petitioners moved for publication of this decision as a precedent with broad ramifications for the high volume of prisoner litigation about disciplinary proceedings. The district court disagreed, reasoning that Mr. Gotcher's claims

> were dismissed because of his failure to identify a federal or state created liberty interest giving rise to due process claims. The decision was controlled by the long line of authority following the landmark case of *Wolff v. McDonnell*, 418

> U.S. 539 (1974). The Court's Order did not announce novel or noteworthy principles suitable for publication.

App. D. Mr. Gotcher filed a timely notice of appeal to the Ninth Circuit, and Petitioners arranged to have counsel appear for Mr. Gotcher.

After the appeal had been briefed, this Court announced its decision in *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995), which clarified the standard for determining the existence of state created liberty interests in prisoner cases. The Ninth Circuit asked the parties to submit supplemental briefs addressing what effect, if any, *Sandin* should have on this case. App. E. Petitioners maintained that under *Wolff*, and now *Sandin*, Washington had not created a liberty interest in avoiding discipline because disciplinary sanctions were neither atypical nor significant for Washington prisoners.

On October 4, 1995, the Ninth Circuit reversed the district court's decision that Washington's prison disciplinary system did not create a liberty interest, and remanded the matter for further proceedings. *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995), App. B. First, the Ninth Circuit held that Mr. Gotcher was not required to exhaust habeas remedies under *Heck v. Humphrey*, 512 U.S. _, 114 S.Ct. 2364 (1994) because Mr. Gotcher brought a "claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits)."

Gotcher, 66 F.3d at 1099, App. A-7. Even though Mr. Gotcher had made a general claim for injunctive relief, the Ninth Circuit did not explain how it concluded that his confusing *pro se* complaint did not seek restoration of the lost good-time credits, or why the case was limited to the procedures of the hearing, and not the resulting sanctions. In addition, the Ninth Circuit did not determine whether, under *Heck*, a judgment in favor of Mr. Gotcher would not demonstrate the invalidity of the sanctions he received.

With respect to liberty interests, the Ninth Circuit concluded that Washington had created a liberty interest in good-time credits because the state's system for prison discipline was "indistinguishable from Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v. McDonnell* found to confer a liberty interest on inmates." *Gotcher*, 66 F.3d at 1100; App. A-9. In reaching this conclusion, the Ninth Circuit did not determine whether Mr. Gotcher had established an "atypical and significant hardship in relation to the ordinary incidents of prison life." *Sandin*, 115 S.Ct. at 2300. In this regard, the Ninth Circuit failed to address fundamental distinctions between Washington's system for discipline, and the unique Nebraska system that *Wolff* found to create a liberty

interest.[4]

Petitioners timely filed a petition for rehearing with suggestion for a rehearing *en banc*. On November 27, 1995, the Ninth Circuit denied the petition. App. F.

V. REASONS FOR GRANTING THE WRIT

This case presents this Court with a unique opportunity to resolve two distinct questions of broad public importance to the high-volume of litigation pursued by prisoners in federal courts. The first question lies at the intersection of the habeas corpus and civil rights statutes: can a prisoner bring a challenge to prison disciplinary proceedings under § 1983 regardless of whether it demonstrates the invalidity of disciplinary sanctions such as loss of good-time credits.[5]

The second question involves the possible expansion of constitutional protection for state prisoners: do inmates have a state created liberty interest in avoiding disciplinary sanctions, including a loss of good-time credits, even though prison officials impose those sanctions in response to a broad range of

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[4]With respect to disciplinary segregation, the Ninth Circuit determined that there was an insufficient factual record from which to determine if the sanction imposed an atypical and significant hardship. As a result, the Ninth Circuit remanded that portion of the case for further proceedings. *Gotcher*, 66 F.3d at 1101; App. A-11 to A-12.

[5]This first question has also been raised in a companion petition for a writ of certiorari in *Edwards v. Balisok*, Supreme Court No. 95-1352, which was filed on February 20, 1996.

misconduct in their day-to-day management of the state prison?

The Ninth Circuit's answers to these questions overlook a fundamental principle: the day-to-day management of a state prison is best left to the state courts and state officials, and should only be subject to scrutiny of the federal judiciary in exceptional cases.[6] Despite this Court's repeated admonitions against intrusion into this sensitive area of state concern, *Gotcher* represents an unwarranted expansion of federal judicial review for prisoners who are unhappy with the outcome of routine prison disciplinary proceedings.

A. Review of the First Question Is Necessary to Resolve a Substantial Federal Question On Which Circuit Courts Conflict.

1. There is a Continuing Conflict Between *Preiser v. Rodriguez* and *Wolff v. McDonnell*.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court held that habeas corpus is the exclusive remedy for a state prisoner who wishes to challenge the fact or duration of his confinement. This Court emphasized that the exhaustion requirement in federal habeas actions is rooted in important considerations of federal-state comity that were found to be

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[6]See *Sandin v. Conner*, 115 S. Ct. 2293, 2299 (1995); *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 456 (1985); *Ponte v. Real*, 471 U.S. 491, 498-99 (1985); *Bell v. Wolfish*, 441 U.S. 520, 545-47 (1979); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 562-63 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973).

fundamental by this Court long before Congress codified it in 1948. 411 U.S. at 490-491; *Ex parte Royall*, 117 U.S. 241, 251 (1886).

The exhaustion requirement is particularly important in cases where a prisoner challenges a prison disciplinary proceeding. *Preiser*, 411 U.S. at 492. *Preiser* held that states should be given the "first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492. Mindful of a loophole that would allow circumvention of the exhaustion requirement, *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleadings." *Id.* at 489-90. Left unresolved in *Preiser* was whether a prisoner could bring a § 1983 action for money damages instead of an action for immediate or speedier release.

Shortly after *Preiser*, this Court decided *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974), which involved prisoners in a class action seeking both injunctive relief and monetary damages pursuant to § 1983.[7] *Wolff* relied on *dicta* in *Preiser*, and held that the plaintiffs in the class action could challenge the prison's established procedures for revoking good-time credits in

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[7]In *Wolff*, the prisoner class challenged the constitutionality of state procedural regulations for inmate disciplinary proceedings, including loss of good-time credits, not the procedures applied in a specific proceeding.

their § 1983 action. *Wolff* stated:

> [A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

418 U.S. at 555. This general statement has caused substantial conflict and confusion in the federal courts. Judge Easterbrook observed,

> Since [*Wolff*] it has been difficult to know how to classify suits that purport to be about procedures . . . , but that logically entail a shorter duration of confinement if the prisoner wins.

Clark v. Thompson, 960 F.2d 663, 664 (7th Cir. 1992) (Citation omitted). The Fifth Circuit made a similar observation:

> without additional guidance from the Supreme Court, the circuit courts have struggled to establish clear standards for determining how the rules set forth by *Preiser* and *Wolff* should be applied to § 1983 claims . . . "

Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1116 (5th Cir. 1987). This case presents this Court with an opportunity to provide the guidance that circuit courts need.

2. *Heck v. Humphrey* Did Not Resolve the Conflict Between *Preiser* and *Wolff*.

In *Heck*, this Court held that a prisoner may bring a civil rights claim if "the district court determines that the plaintiff's action . . . will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff[.]" 114 S. Ct. at 2372. *Heck* specifically rejected the *dicta* in *Preiser* relied on by *Wolff* as "an unreliable, if not an unintelligible, guide". 114 S. Ct. at 2370.

However, *Heck* did not resolve the tension between *Preiser* and *Wolff*. 114 S.Ct. at 2370. Instead, *Heck* seemed to endorse the troublesome language *Wolff* stating:

> [*Wolff*] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (*i.e.*, denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call into question the lawfulness of the plaintiff's continuing confinement.

Id. On the other hand, a *per se* rule that challenges to prison disciplinary procedures can be brought pursuant to § 1983, regardless of the relief sought, is totally inconsistent with the Court's reasoning in *Heck*. Thus, the question remains: Can a prisoner bring a challenge to prison disciplinary procedures that result in the loss of good-time credits under § 1983 regardless of whether it demonstrates the invalidity of

disciplinary sanctions such as loss of good-time credits?

Here, the Ninth Circuit relied upon the language from *Heck* and *Wolff* to conclude that this case "involved a claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits)." *Gotcher*, 66 F.3d at 1099; App. A-7, (quoting *Heck*, 114 S.Ct. at 2370). The Ninth Circuit apparently assumed that any challenge to prison disciplinary procedure, even where the plaintiff seeks injunctive relief, would not call into question the loss of good-time credits. App. A-7 to A-8. This assumption is incorrect. Constitutional defects in prison disciplinary procedures do result in the invalidity of disciplinary sanctions.[8]

In Washington, the appellate courts have exercised their power to reverse the decision and sanctions of disciplinary hearing officers and order new hearings when the courts determined that the procedures followed by prison officials did not pass constitutional muster. *See, e.g., In re Reismiller*, 101 Wn.2d 291, 298, 678 P.2d 323 (1984); and *In re Hunter*, 43 Wn. App. 174, 177, 715 P.2d 1146 (1986).

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[8]It is unclear why the Ninth Circuit concluded that Mr. Gotcher's claim did not pertain to his loss of good-time credits. Mr. Gotcher sought injunctive relief relating to the unconstitutionality of his disciplinary proceeding. App. G-1. Mr. Gotcher's complaint does not disclaim an interest in seeking the return of the lost good-time credits and, given a prisoner's natural desire to be released early, such a disclaimer would have been surprising. Even so, success on Mr. Gotcher's challenge would have rendered the loss of credits unlawful.

The Ninth Circuit has essentially adopted a *per se* rule that any challenge to prison disciplinary procedures is proper under § 1983, regardless of whether it demonstrates the invalidity of disciplinary sanctions such as the loss of good-time credits. Such a rationale is inconsistent with the principles of *Preiser* and *Heck*, and is not warranted by the language in *Wolff*, where, unlike Mr. Gotcher, the class of prisoners did not challenge a specific hearing where time was lost. A substantial federal question needs to be resolved.

3. Federal Circuit Courts Are In Conflict Regarding Jurisdiction Over § 1983 Challenges To Prison Disciplinary Proceedings.

In this case, the Ninth Circuit concluded that a prisoner's challenge to a specific disciplinary hearing will never "call into question" the resulting loss of good-time credits as long as the prisoner indicates that he is only challenging the procedures, and not the result, of the hearing. App. A-6 to A-8. The Ninth Circuit applied this rule even though Mr. Gotcher's complaint specifically sought injunctive relief in response to the disciplinary proceedings and the language of the complaint did not specifically limit the challenge to the procedures used during the disciplinary hearing. App. G-1.

The Ninth Circuit's approach directly conflicts with the approach taken by the Fifth Circuit in *Serio*. After reviewing the

prisoner's §1983 claim and this Court's decisions in *Preiser* and *Wolff*, the Fifth Circuit held that a prisoner must exhaust his state habeas remedies before bringing a § 1983 claim that his or her parole hearing was constitutionally defective, despite the prisoner's characterization of his claims as "procedural". *Serio*, 821 F. 2d at 1118.

The Ninth Circuit's approach also conflicts with the Eighth Circuit's decision in *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987). In *Offet*, the Eighth Circuit reviewed a prisoner's challenge to rules governing good-time credits and required him to exhaust his state court remedies, reasoning:

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us no answer to the concerns of federalism that cases such as this one raise.

823 F.2d at 1259 (citations omitted). The court explained that "[s]uch a facile distinction between habeas and other claims quickly would subvert the policy announced in *Preiser*", and would deprive the state court system of its first opportunity to address the merits of the underlying constitutional issue. *Id.* at 1258 (citations omitted). *see also Armento-Bey v. Harper*, 68 F.3d 215, 216 (8th Cir. 1995) (Bowman, dissenting). Under the analysis of these cases, Mr. Gotcher's claim would have been dismissed or stayed pending his exhaustion of state court

remedies.

The Ninth Circuit's decision also appears to conflict with the D.C. and Fourth Circuits. In *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994), the D.C. Circuit required exhaustion of the prisoners' due process challenge to the replacement of a treatment program under which they were entitled to go[illegible]-time credits. In *Leonard v. Hammond*, 804 F.2d 838, 839 (4th Cir. 1986), the Fourth Circuit required exhaustion in a case where plaintiffs sought to enjoin the future imprisonment (for civil contempt) of indigents who are not first appointed counsel.

Other circuits take a narrower view, focusing solely on whether the relief sought pertains to procedures used, not results. *See Viens v. Daniels*, 871 F.2d 1328, 1333 (7th Cir. 1989) (rejecting the Eighth Circuit's approach in *Offet*); *Gwin v. Snow*, 870 F.2d 616, 625-26 (11th Cir. 1989) (refusing to adopt the bright-line rule set forth in *Serio*).

The federal courts' longstanding conflict and confusion with respect to jurisdiction under § 1983 of challenges to prison disciplinary procedures, which was not resolved in *Heck*, presents a significant question that requires resolution by this Court.

B. Review of the Second Question is Necessary to Determine Whether Prisoners Have a Liberty Interest In Good-Time Credits Which May Be Lost as a Result of a Broad Range of Misconduct.

1. Circuit Courts Have Incorrectly Assumed the Existence of a Liberty Interest Whenever A Disciplinary Proceeding Results In Loss of Good-Time Credits.

This Court has not reviewed a prison disciplinary case involving a loss of good-time credits for more than 20 years. *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, the Court concluded, based upon a careful review of state statutes, that Nebraska had created a liberty interest in good time credits. Only after resolving this fundamental question of liberty did this Court proceed to decide whether Nebraska's regulations afforded due process to prisoners at disciplinary proceedings.

Since this 1974 decision, federal courts have either cited *Wolff* for the general proposition that the Constitution itself requires due process in all state disciplinary hearings involving loss of good-time credits, or merely relied upon *Wolff* for the process that is due at the hearing.[9] With few exceptions, the

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[9] *Benitez v. Wolff*, 985 F.2d 662, 665 (2nd Cir. 1993); *Mays v. Mahoney*, 23 F.3d 660, 661 (2nd Cir. 1994); *Mendoza v. Miller*, 779 F.2d 1287, 1292 (7th Cir. 1985); *Black v. Lane*, 22 F.3d 1395, 1401-02 (7th Cir. 1994); *Henderson v. U.S. Parole Comm'n*, 13 F.3d 1073, 1077 (7th Cir. 1994); *Freitas v. Auger*, 837 F.2d 806, 808 (8th Cir. 1988); *Hughes v. Lee County Dist. Court, Iowa*, 9 F.3d 1366, 1367 (8th Cir. 1993); *Taylor v. Wallace*, 931 F.2d 698, 700 (10th Cir. 1991); *Lucero v. Gunter*, 17 F.3d 1347, 1351 (10th

cases have completely ignored the preliminary question of whether a liberty interest is at stake. The lack of cases on this point is remarkable, and demonstrates the need to clarify that federal courts should not exercise jurisdiction by assuming that there is a liberty interest in loss of good-time credits. [10]

In contrast to the lower courts, this Court has always prefaced its discussion in post-*Wolff* good-time credit cases by carefully pointing out that the existence of a state created liberty interest was not in dispute. For instance, in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445, 453-54 (1985), this Court reiterated that federal review of state prison disciplinary proceedings hinges on whether state law has created a constitutional right:

> Petitioner does not challenge the holding below that Massachusetts law creates a liberty interest in good time credits. Accordingly, we proceed on the assumption that the protections of the Fourteenth Amendment apply to the loss of the good time credits involved here, and direct our inquiry to the nature of the constitutionally required procedures.

Cir. 1994); *Battle v. Barton*, 970 F.2d 779, 782 (11th Cir. 1992); *Young v. Kann*, 926 F.3d 779, 782 (11th Cir. 1992).

[10] A few cases have addressed and rejected prisoner's claims of a liberty interest in the "earning" of early release credits. *See Hansard v. Barrett*, 980 F.2d 1059, 1062 (6th Cir. 1992) (Ohio law did not create a constitutional right to earn "sentence reductions" for work); *Waletzki v. Keohane*, 13 F.3d 1079 (7th Cir. 1994) (federal statute allowing award of good-time credits did not create a liberty interest); *Ewell v. Murray*, 813 F.Supp. 1180 (W.D.Va. 1993) (Virginia law did not create a liberty interest in earning good-time credits).

(Citations omitted). Similarly, in *Ponte v. Real*, 471 U.S. 491, 495 (1985), this Court explicitly noted that

> Petitioner does not dispute that respondent possessed a "liberty" interest, by reason of the provisions of Massachusetts state law, affording him "good time" credits, . . .

Thus, this Court has consistently recognized that the Constitution does not independently recognize a liberty interest in a state's disciplinary system for withdrawal of good-time credits, and that such an interest must stem from a careful review such as this Court undertook in *Wolff*.

2. Circuit Courts Need Clarification That States Do No Create A Liberty Interest Merely By Enacting A Disciplinary System Involving Loss of Good-Time Credits.

In *Sandin*, this Court redefined the standard for determining whether a state has created a liberty interest by returning to the due process principles it set forth in *Wolff*. Under *Sandin*, a state will only be held to "create" a constitutional liberty interest if it has given inmates a right that, if taken, would impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 115 S. Ct. at 2300. In defining and applying this standard of "atypical and significant hardship", this Court looked to whether the state's punitive action presented "a dramatic departure from the basic conditions" of the inmate's criminal sentence. *Id.* at 2301.

This Court found it necessary to re-establish this threshold standard in order to reduce judicial involvement in the "day-to-day management of prisons", and to afford "appropriate deference and flexibility to state officials trying to manage a volatile environment." *Id.* at 2299, *citing Wolff*, 418 U.S. at 561-63. This standard avoids judicial involvement in the day to day management of prisons by recognizing that,

> Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by law.

Id. at 2301. Such discipline is a normal incident of prison life falling within "the range of confinement to be normally expected for one serving an indeterminate term" and "effectuates prison management and prisoner rehabilitative goals." *Id.* at 2301, 2302. Under such a system, expansion of the existing constitutional protections is not warranted. *Id.* at 2302, n. 11.

Sandin only involved the sanction of disciplinary segregation. This Court did not address the question of good time credits, last reviewed in *Wolff*.

The question of early release based upon good-time credits is squarely presented in this case. Rather than review a state's disciplinary system for an atypical and significant hardship, the Ninth Circuit has adopted a rule that has automatically "constitutionalized" Washington's prison

disciplinary proceedings, despite the fact that these proceedings are a normal incident of prison life, involving sanctions that are imposed in response to a broad range of prisoner misconduct.

Unlike the system at issue in *Wolff*, Washington's disciplinary code does not reserve the sanction of lost good time credits for the level of serious misconduct identified by Nebraska law.[11] The Department of Corrections has the ability to adopt rules that would result in loss of good-time credits for any misconduct. Even under the current rules, Washington prison officials are entitled to withdraw good time credits for such routine violations as throwing objects, lying to a hearing officer, or destroying more than $5 worth of property. App. H. Further, the rules currently permit Washington prison officials to define additional misconduct that can result in a loss of good-

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[11] *Wolff* involved a state created interest in early release, the loss of which was both atypical and significant. The deprivation was "significant" in the sense that the Nebraska statute clearly directed prison officials to confer, or "bestow" on inmates the right to sentence reductions. *Wolff*, 418 U.S. at 545, n. 5, and 546, n. 6. Rather than a directive that prison officials enact a system for prison management, Nebraska law intentionally created a significant interest that fundamentally altered the range of custody imposed by the sentence. The deprivation at issue in *Wolff* was also atypical because the statutorily guaranteed time credits could not be revoked as a result of a "broad range of prison misconduct" that is the daily subject of a prison disciplinary system. Instead, in Nebraska the deprivation of time credits was reserved for rare and narrowly defined cases of flagrant or major misconduct that also rose to the level of a criminal offense. The examples given were "assault, escape, attempt to escape." *Wolff*, 418 U.S. at 545, n. 5, *citing* Neb.Rev.Stat. § 83-185 (1971).

time credits.[12] Wash. Admin. Code §§ 137-28-010 and 030, App. H. Finally, unlike the significant statutory guarantee of early release in Nebraska, Washington statutes affirmatively prohibit early release of an offender unless the sentence has been reduced pursuant to a system designed and administered by those officials who are charged with the responsibility of maintaining order and security within the prisons. Wash. Rev. Code § 9.94A.150, App. M.

The Ninth Circuit's decision is inconsistent with the principles announced by this Court in both *Wolff* and *Sandin*, and will lead to unwarranted review by the federal judiciary of numerous disciplinary sanctions imposed in response to a broad range of prisoner misconduct. By finding a liberty interest under these circumstances, the Ninth Circuit has reached the result that this Court has repeatedly sought to avoid -- direct involvement of the federal courts in the day-to-day management of the state prisons. This Court now has an opportunity to clarify for all courts that federal review of prisoner disciplinary proceedings should not be assumed merely because loss of good-time credits is an available sanction.

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[12]This is far different than the states reviewed in *Wolff*, where the sanction was reserved for misconduct that would also have risen to the level of a criminal offense. *See* n. 11, *infra*.

VI. CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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State of Washington

Talis Merle Abolins
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February 1996

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35484

D.C. No. CV-93-00120-FVS

OPINION

Norman Gotcher, Jr.,

Plaintiff-Appellant,

v.

TANA WOOD, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted
August 10, 1995--Seattle, Washington

Filed October 4, 1995

Before: Robert R. Beezer and Michael Daly Hawkins,
Circuit Judges, and Dickran M. Tevrizian,* District Judge

Opinion by Judge Hawkins

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*The Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a district court judgment and remanded. The court held that the district court erred in dismissing a Washington state prisoner's claim that loss of "good conduct time credits" constituted a compensable violation of his due process rights.

Pursuant to Washington's Sentencing Reform Act, inmates who do not commit serious infractions are entitled to good conduct time credits. Appellant Norman Gotcher, Jr., who is incarcerated in Washington State, was found guilty of serious infractions of a prison disciplinary code. As a result, he lost 30 days of good conduct time credits and was placed in disciplinary segregation.

Gotcher filed a civil rights action against appellee Superintendent of the Washington State Penitentiary Tana Wood and others (collectively, Wood). He alleged that, with regard to the disciplinary hearings on the infractions, Washington Department of Corrections (DOC) employees failed to give him proper notice of allegations and did not allow him to call witnesses or present documentary evidence. The district court granted Wood's motion to dismiss, concluding that Gotcher did

not possess a protectable liberty interest. The court applied the "mandatory language/substantive predicate" due process analysis set forth in earlier Supreme Court opinions. Gotcher appealed.

[1] Gotcher's case did not call into question the lawfulness of his continuing confinement. His case involved a claim for using the wrong procedure, not for reaching the wrong result.

[2] The Court has abandoned the "mandatory language/substantive predicate" analysis and revised the relevant due process analysis. **[3]** For purposes of that analysis, the scheme of the good conduct time credit system in Washington appeared to be indistinguishable from a good conduct time credit system which the Court, in *Wolff v. McDonnell*, found to confer a liberty interest on inmates. **[4]** Despite the fact that the DOC issued a "Policy" stating that it was not its intent to create a liberty interest, **[5]** this case fell squarely under *Wolff* with regard to whether Gotcher possessed a liberty interest in accumulating good time credits. Accordingly, the district court's ruling was reversed.

[6] The record was insufficient for a determination of whether the disciplinary segregation at issue in this case imposed an "atypical and significant hardship" on Gotcher "in relation to the ordinary incidents of prison life." Thus, remand was warranted on Gotcher's claim regarding disciplinary segregation.

COUNSEL

John Midgley, Evergreen Legal Services, Seattle, Washington, for the plaintiff-appellant.

Talis M. Abolins, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

HAWKINS, Circuit Judge:

Appellant Norman Gotcher ("Gotcher") appeals the district court's dismissal of his civil rights action against Tana Wood, the Superintendent of the Washington State Penitentiary, and others (collectively "Wood"). Gotcher's appeal presents two issues: (1) does Gotcher possess a due process liberty interest in the accrual of good conduct time, and (2) does he possess a due process liberty interest in remaining free from disciplinary segregation. The district court concluded that he possessed neither and dismissed his complaint. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we believe the district court's dismissal of Gotcher's action was inappropriate we reverse and remand the matter to the district court.

I.

Gotcher is incarcerated in Washington State, where he is serving a sentence for burglary. He alleges in his complaint that

he was charged twice in 1992 with "serious infractions" of his prison's disciplinary code. Specifically, he was charged with "[t]hreatening another with bodily harm or with an offense against his/her person." *See* Wash. Admin. Code (WAC) § 137-28-030(506). He alleges that, with regard to the disciplinary hearings on these infractions, Washington Department of Correction (DOC) employees, among other things, failed to give him 24-hour advanced written notice of allegations against him and did not allow him to call witnesses or present documentary evidence in his defense.

Gotcher was found guilty of the serious infractions at the disciplinary hearings. As a consequence, he lost 30 days of good conduct time credits and was placed in disciplinary segregation.

This action, brought under 42 U.S.C. § 1983, followed. Among other claims, Gotcher alleges that the DOC staff failed to afford him the process he was due in connection with the disciplinary hearings. Accordingly, he claims that his loss of good conduct time credits and his disciplinary segregation constituted compensable violations of his due process rights.

Wood filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that because Washington prison inmates do not possess a liberty interest in remaining free from disciplinary action, the complaint failed to state a claim

upon which relief could be granted. In granting the motion to dismiss, the district court noted that because the Due Process Clause of the Fourteenth Amendment does not give rise to liberty interests in good conduct time credits or in remaining within the general prison population, the source of Gotcher's claimed liberty interest had to be Washington state law. Applying the "mandatory language/substantive predicate" due process analysis set forth in such Supreme Court opinions as *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454 (1989), the district court concluded that Gotcher did not possess a protectable liberty interest. The court therefore dismissed his complaint. Gotcher timely appealed that decision.

We review de novo a dismissal for failure to state a claim, as it is a ruling on a question of law. *Everett & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All allegations of fact must be taken as true and construed in the light most favorable to Gotcher. *See id.* at 229. We will not affirm such a dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

II.

As a threshold matter, Wood argues that the Supreme Court's recent decision in *Heck v. Humphrey*, 114 S. Ct. 2364

(1994), bars Gotcher's claim. In *Heck*, the Court held that, when this type of claim, if successful, will *necessarily* require a federal court to determine the constitutional validity of the inmate's continuing confinement, the claim is not cognizable until the plaintiff's sentence or conviction has already been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 2372.

[1] Wood argues that, because Gotcher challenges the disciplinary procedure which resulted in the loss of his good conduct time credits, his claim is governed by *Heck* because, if successful, it might affect the duration of his confinement. Wood's reliance on *Heck*, however, is misplaced. Gotcher's good conduct time credit claim is similar to the claim in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Heck*, the Court expressly distinguished *Wolff*, noting that *Wolff* challenged the *procedure* by which the inmate was denied good-time credits. *Wolff*, like this case, involved a claim for using the wrong procedure, not for reaching the wrong result (i.e., the denial of good time credits). *See Heck*, 114 S. Ct. at 2370. "Nor is there any indication in the [*Wolff*] opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in *Wolff* did *not* call

into question the lawfulness of the plaintiff's continuing confinement." *Id.* Likewise, Gotcher's case does not call into question the lawfulness of his continuing confinement and is not barred by *Heck*.

III.

We first address Gotcher's claimed liberty interest in receiving good conduct time credit. Pursuant to Washington's Sentencing Reform Act (SRA), inmates can earn an early release date through an earned early release program comprised of "earned time," *see* WAC § 137-28-006(5), and "good conduct time credits," *see* WAC § 137-28-006(6). "Good conduct time credits," which are at issue here, are defined as that portion of an inmate's potential sentence reduction gained by not receiving a "serious infraction." WAC § 137-28-006(6); *see also* DOC Policy No. 350.130 (defining "Good Conduct Time" as "[t]hat portion of time which an offender is eligible to earn by behaving pro-socially, i.e. not receiving serious infractions"). Thus, inmates who do not commit serious infractions are entitled to good conduct time credits, which can constitute 10 days of credit for every 30 days served. *See* DOC Policy No. 350.130.

These provisions were developed in response to Revised Code of Washington (RCW) § 72.09.130, which provides that the DOC "shall adopt" a system providing incentives for good conduct. Pursuant to RCW § 72.09.130, the good conduct time

credit program "shall be fair, measurable, and understandable to offenders, staff, and the public."

[2] Applying the "mandatory language/substantive predicate" due process analysis of *Helm* and *Thompson* to these facts, the district court held that Gotcher did not have a protectable liberty interest in the accrual of good conduct time credits. The Supreme Court, however, has since abandoned the "mandatory language/substantive predicate" analysis. *See Sandin v. Conner*, 115 S. Ct. 2293 (1995). Calling for a "return to the due process principles . . . correctly established and applied" in *Wolff v. McDonnell*, 418 U.S. 558 (1974), and *Meachum v. Fano*, 427 U.S. 215 (1976), the Court revised the due process analysis to be applied in prisoner § 1983 actions.

> Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

115 S. Ct. at 2300.

[3] For purposes of our due process analysis, the scheme of the good conduct time credit system in Washington appears to be indistinguishable from Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v.*

McDonnell found to confer a liberty interest on inmates. *See* 418 U.S. at 557. As the Court held in *Wolff*.

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing in "every conceivable case of government impairment of private interest." But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimal procedures appropriate under the circumstances and required by the Due Process Clause to insure that that state-created right is not arbitrarily abrogated.

Id. (citations omitted).

[4] One apparent distinction between this case and *Wolff*, however, is that the Washington DOC has issued a "Policy" stating that

> [i]t is the purpose of Department policy to guide the Department personnel in the conduct and performance of their duties. It is not the intent to grant offenders under the jurisdiction of the Department by policy a state-created liberty interest in addition to those rights guaranteed to offenders under the United States Constitution.

DOC Policy 100.100, at 1.

This DOC policy directive, however, is not controlling. As *Wolff* indicates, the focus is whether the State has created a right of "real substance." If it has done so, the State cannot then emasculate that right merely by issuing the disclaimer that it was not its intent to create a liberty interest. Moreover, the disclaimer in a DOC policy statement does not override the provisions of the Washington Administrative Code. And as the WAC states with regard to prison disciplinary procedures, its purpose is to "provide a standardized system consistent with constitutional due process for ascertaining whether [prisoner] misconduct" has occurred. WAC § 137-28-005(1).

[5] Thus, with regard to whether Gotcher possesses a liberty interest in accumulating good time credits, this case falls squarely under *Wolff*, which the Supreme Court noted in *Sandin* "correctly established and applied" due process principles in the prisoner liberty interest context. *See* 115 S. Ct. at 2300. Because the district court's ruling conflicts with *Wolff*, we reverse that ruling.

IV.

We next address Gotcher's claimed liberty interest in remaining free from disciplinary segregation. In *Sandin v. Conner*, the Supreme Court determined that a Hawaii inmate did not have a liberty interest in remaining free from disciplinary segregation because the inmate's 30 days in segregated

disciplinary confinement "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." 115 S. Ct. at 2301. The Court reached this conclusion after reviewing the record (the district court proceeding was resolved by summary judgment) and finding that, "with insignificant exceptions," the inmate's disciplinary segregation "mirrored those conditions imposed upon inmates in administrative and protective custody." *Id.* The Court supported this conclusion by discussing the various custodial conditions at the particular prison in question and by demonstrating that the plaintiff's segregation "did not work a major disruption in his environment." *Id.*

[6] In contrast to the detailed record in *Sandin*, the record in this appeal is insufficient for a determination of whether the disciplinary segregation at issue imposed an "atypical and significant hardship on Gotcher in relation to the ordinary incidents of prison life." *Sandin*, 115 S. Ct. at 2300. Because we will not affirm a dismissal under Fed. R. Civ. P. 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, *Everett & Jennings, Inc.*, 23 F.3d at 228, we reverse the district court on its dismissal of Gotcher's claim with regard to disciplinary segregation, and we remand for further proceedings.

V.

For the foregoing reasons, we REVERSE the district court's dismissal and REMAND for further proceedings.

[FILED]
[October 13, 1993]

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-120-FVS

ORDER DISMISSING EQUAL PROTECTION CLAIM AND ORDER OF SERVICE

NORMAN GOTCHER, Jr.,

Plaintiff,

v.

TANA WOOD, ALAN WALTER, LT. G. EDWARDS, JULIUS VAN SKIKE, WAYNE HELGESON, Lt. LAWSON, RICH ALT,

Defendants.

BY ORDER OF THIS COURT dated July 16, 1993, Plaintiff was directed to file a Second Amended Complaint to correct the deficiencies in his due process and equal protection claims in his First Amended Complaint. Initially, Mr. gotcher filed an incorrect Affidavit of Poverty, however, he has corrected the affidavit. In addition to the affidavit, the Plaintiff has filed a First Amended Complaint. Accordingly, Plaintiff's

First Amended Complaint superseded his Plaintiff's original complaint, and now Plaintiff has filed a Second Amended Complaint which shall supersede his First Amended Complaint.

PLAINTIFF'S ALLEGATIONS

Mr. Gotcher claims that his equal protection and due process rights have been violated by the Defendants because they held hearings and heard appeals at Washington State Penitentiary (WSP) regarding infractions filed against the Plaintiff filed by personnel at Coyote Ridge Corrections Center (CRCC). Plaintiff also alleges that he was even sent additional infractions after he left CRCC. Mr. Gotcher claims that his infraction hearings were held at WSP and conducted by WSP staff for the infractions that took place at CRCC and were charged by CRCC employees.

The Plaintiff alleges he did not receive 24 hours notice prior to his infraction hearing. He also claims Lt. Edwards found him guilty at his infraction hearing, using only the written infraction report, without regard to Plaintiff's assertions that the letter in question was not intended to be a threat, and without any of Plaintiff's requested witnesses being present. Plaintiff maintains that Defendant Edwards did not indicate on the record at his hearing why Plaintiff's witnesses were not called.

Following his infraction hearings, at which he was found guilty, Plaintiff appealed the sanctions ordered to Defendant Wood. Superintendent Wood denied Plaintiff's appeals. The

Plaintiff claims that he wrote Defendant Wood two follow up letters and even talked to her in person regarding his infractions. He alleges that when she finally responded she told him that he would have to appeal his infractions to the superintendent of the institution where the infractions were issued. This, Mr. Gotcher claims, violated his equal protection rights.

Mr. Gotcher renews his claim that Defendant Walter violated his equal protection rights when he set (with only one day's notice to Plaintiff) and conducted an early classification hearing which resulted in Plaintiff's demotion from medium security to close custody and his return to the main institution at WSP. (This claim has been dismissed with prejudice by this Court's previous order.)

The Plaintiff asserts that the Defendants' actions have caused him great difficulty and physical problems such as hair loss and teeth grinding. Plaintiff prays for declaratory and injunctive relief, and for compensatory and punitive damages. Mr. Gotcher has also requested (in his supporting memorandum) a Temporary Restraining Order.

DISCIPLINARY HEARING DUE PROCESS

The due process requirements to be afforded inmates at prison disciplinary hearings are that the inmate receive written notice of the charges, that the inmate be allowed to call witnesses and present documentary evidence unless permitting him to do

so will be "unduly hazardous to institutional safety or correctional goals" and that the inmate receive a written statement by the factfinders as to evidence relied on and reasons for any disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1976).

the findings of a prison disciplinary board which result in the loss of a protected liberty interest must be supported by "some evidence on the record." *Superintendent v. Hill*, 472 U.S. 445, 454 (1985). Under the *Hill* analysis the court determines "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455-56. The record must not be "so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." *Id.* at 457. This Court, however, is not to make its own assessment of the credibility of witnesses or reweigh the evidence. *Id.* at 455.

The right to call witnesses is subject to the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution . . . ." *Baxter v. Palmigiano*, 425 U.S. 308, 321 (1976). "[P]rison officials may be required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but that they may do so either by making the explanation a part of the 'administrative record' in the disciplinary proceeding, or by presenting testimony in court if

the deprivation of a 'liberty' interest is challenged because of that claimed defect in the hearing." *Ponte v. Real*, 471 U.S. 491, 497 (1985).

The Plaintiff alleges that Defendant Edwards failed to establish on the record that calling Plaintiff's witnesses would be unduly hazardous to safety and security concerns. He also alleges he did not receive notice prior to his infraction hearing, and that the hearing was held at Washington State Penitentiary (WSP) and not at Coyote Ridge Corrections Center where the infraction allegedly took place. Plaintiff has alleged facts sufficient to invoke federal subject-matter jurisdiction.

EQUAL PROTECTION

Plaintiff alleges that his equal protection rights have been violated. In *Brandon v. District of Columbia*, 734 F.2d 56 (D.C. Cir. 1984) *cert. denied* 469 U.S. 1127, the court stated the following:

> A prisoner need not always allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the equal protection component of the Fifth Amendment. Even in the absence of a fundamental right or a suspect classification, equal protection requires that a classification between similarly situated individuals bear some rational relationship to a legitimate state purpose. (Citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).)

Brandon, 734 F.2d at 60. Plaintiff's allegations of equal protection violations do not specifically indicate just how he has

been treated differently from other inmates. He does not show by the facts he presents that he is "similarly situated" to the other prisoners who have been treated differently from him. Plaintiff's only mention of a possible racial motivation is regarding the classification committee at his reclassification hearing.[1] In his vague allegation (2nd Amend. Compl. at 10 ¶ 1), Plaintiff presents no facts indicating that the classification committee was in any way racially motivated when they changed his custody status. Thus, regarding a possible equal protection claim, Plaintiff has not alleged facts sufficient to invoke federal subject-matter jurisdiction.

DISMISSAL BASED ON 28 U.S.C. § 1915(d)

Plaintiff is proceeding in this action *in forma pauperis*

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[1]"The central purpose of the Equal Protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). To support a constitutional claim for violation of Equal Protection pursuant to 42 U.S.C. § 1983, the plaintiff must show that the defendant had a racially discriminatory intent or purpose. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Lowe v. City of Monrovia*, 775 F.2d 998, 1010-11 (9th Cir. 1985). The plaintiff need not show that the challenged action was rested solely on racially discriminatory intents or purposes, nor even that racial motivation was a dominant or primary concern. However, there must be proof that a discriminatory purpose was a motivating factor in the challenged decision. *Arlington Heights*, 429 U.S. at 265-66.

under 28 U.S.C. § 1915(d). *Sua sponte* dismissal of this action prior to service of process is justified only if, under section 1915(d), the complaint is frivolous. *Jackson v. State of Arizona*, 885 F.2d 639 (9th Cir. 1989). A complaint is frivolous within the meaning of section 1915(d) only if it lacks an arguable basis in law or fact. *Id.* This court may dismiss *in forma pauperis* claims which are "based on indisputable meritless legal theories" or whose "factual contentions are clearly baseless." *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (such as "claims against which it is clear that the defendants are immune from suit. . . ")). Also, this court may dismiss "claims of infringement of a legal interest which clearly does not exist." *Id.*

Plaintiff's Second Amended Complaint is Plaintiff's third attempt at presenting an equal protection claim. After two orders directing him to amend and describing the deficiencies in his equal protection allegations, Plaintiff still fails to show he is being treated differently from other similarly situated inmates. He has also failed to show that Defendants were in any way motivated by racial bias. As a result, his repeated allegations that he equal protection rights have been violated have no substance and should be dismissed. Accordingly,

IT IS ORDERED that Plaintiff's allegations of equal protection violations are **DISMISSED WITH PREJUDICE.**

IT IS ORDERED regarding Plaintiff's due process claims only,

1. The United States Marshal, in compliance with Fed. R. Civ. P. 4(c)(2)(c)(ii), shall serve, by first class mail, a copy of the Summons and Second Amended Complaint upon the above-named Defendants, together with two copies of a notice and acknowledgement and a return envelope, postage prepaid, addressed to the sender. All costs of service shall be advanced by the United States.

2. The clerk shall mail a copy of the Second Amended Complaint to the Attorney General for the State of Washington.

3. Defendants shall file an answer or otherwise respond to the Complaint within forty-five (45) days after service. Failure to so respond may result in entry of a default judgment, pursuant to LR 55.

4. Plaintiff shall serve upon Defendants, or if appearance has been entered by counsel, upon their attorney, a copy of every further pleading or other document submitted for consideration by the court. He shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to the Defendants or to their counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk or which fails to include a certificate of service will be

disregarded by the Court. Plaintiff is also advised that throughout this action he must notify the Clerk of the Court regarding any change of address and phone number (at least a message phone). Failure to do so might result in the dismissal of the action if the Court is unable to contact Plaintiff.

TELEPHONIC SCHEDULING CONFERENCE

A telephonic scheduling conference between the Court, Plaintiff and counsel for Defendant will be held on **January 4, 1994, at 8:30 a.m.** The Defendant will initiate the call.

On or before December 21, 1993, Plaintiff and counsel for Defendants shall file and serve written status reports with respect to the parties' positions concerning:

1. Service of process on parties not yet served;

2. Jurisdiction and venue;

3. Anticipated motions;

4. Anticipated and remaining discovery, including limitations on discovery.

5. Further proceedings, including setting dates for discovery cutoff, pretrial and trial;

6. Appropriateness of special procedures such as consolidation of actions for discovery or pretrial, or reference to a magistrate judge;

7. Modification of the standard pretrial procedure due to the relative simplicity or complexity of the action or proceeding;

8. Anticipated trial time required - if reasonable evaluation is practical;

9. Prospects for settlement;

10. Any other matters that may be conducive to the just, efficient and economical determination of the action or proceeding, including the definition or limitation of issues.

11. In his report, Plaintiff shall list the name, address and expected testimony from each witness he desires the court to subpoena to testify at the trial of this matter.

Plaintiff and counsel for Defendant shall also advise the Clerk whether all parties will consent to trial of this case by a Magistrate Judge and whether, in the event of an appeal, the appeal will be taken to the Ninth Circuit Court of Appeals. 28 U.S.C. § 636. In the absence of consent by all parties, disclosure as to which consented and which did not will be made only to the clerk.

IT IS SO ORDERED. The Clerk of the Court shall file this Order and serve copies of it on the Plaintiff, the Defendants, and counsel for Defendants.

Dated this 12th day of October, 1993.

FRED VAN SICKLE
United States District Judge

[FILED]
[April 26, 1994]

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-120-FVS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, GRANTING MOTION TO FILE OVERLENGTH BRIEF, AND DENYING MOTIONS AS MOOT

NORMAN GOTCHER, JR.,

Plaintiff,

v.

TANA WOOD, et al.,

Defendants.

BEFORE THE COURT are Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12 (b) (6) (Ct. Rec. 30), Motion to File Overlength Brief (Ct. Rec. 31), and Motion for Expedited Hearing (Ct. Rec. 34). Subsequent to the court taking these motions under consideration, Plaintiff filed a Motion for a stay and "for notification of defendant's counsel's failures to plaintiff's property" (Ct. Rec. 53, parts 1 & 2). Plaintiff appears *pro se*; Defendants are represented by Washington state Assistant

Attorney General Talis M. Abolins. After reviewing the record and being fully advised in this matter, the Court enters this order to memorialize its ruling.

BACKGROUND FACTS

Norman Gotcher Jr., an inmate currently incarcerated at the Washington State Penitentiary ("WSP") in Walla Walla, Washington, filed this civil rights complaint *in forma pauperis* on April 2, 1993. After various amendments were accomplished, the court, on October 12, 1993, ordered service of the due process allegations, and dismissed other claims under 28 U.S.C. § 1915 (d).

The alleged due process violations concern the handling of infractions which arose while Plaintiff was incarcerated at the Coyote Ridge Corrections Center ("CRCC") in Connell, Washington.[1] Plaintiff complains that the CRCC infraction hearings were held at WSP and conducted by WSP staff in violation of prison procedure. He also complains that he was not

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[1]According to infraction reports attached to Plaintiff's complaint, on September 16, 1992, Plaintiff brushed up against and made intimidating comments to a female staff member who was notarizing and copying some documents for him. He was cited with 3 infractions. Plaintiff later wrote a letter which stated "I will make her pay in the end if it takes me 20 years", and "I will use all my sources to find out about her." Although Plaintiff claimed these comments were intended to refer to a lawsuit against the staff member, they were deemed sufficiently threatening to warrant additional disciplinary action. It is not the purpose of this court to revisit the conclusions of the infraction hearing officers, but simply to consider whether due process was afforded Plaintiff.

afforded adequate notice of the infraction hearings, and was denied the opportunity to call witnesses on his behalf. Finally, Plaintiff states that some of the infraction reports were sent to WSP after Plaintiff left CRCC.

The WSP hearing officers found Plaintiff guilty of all infractions. As a result, he was placed in disciplinary segregation, his classification status was downgraded from medium security to close custody, and he lost "good time" credits. The sanctions were upheld on appeal to WSP Superintendent Tana Wood.

In addition to the claims regarding the CRCC infractions, the Court granted leave for Plaintiff to file supplemental complaints which allege retaliation and denial of access to the courts (Ct. Recs. 42 & 43). Specifically, the allegations charge that various disciplinary actions at WSP were taken in retaliation for this lawsuit, and that Plaintiff's legal files have been confiscated. Defendants were granted leave to file a reply memorandum in support of dismissal addressing these supplemental allegations.

DISCUSSION

When a motion to dismiss is brought under Fed.R.Civ.P. 12 (b) (6), all allegations of material fact are taken as true and are construed in the light most favorable to the non-moving party. Imagineering, Inc. v. Kiewt Pacific Co., 976 F.2d 1303,

1306 (9th Cir.1992). A complaint should not be dismissed "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Elias v. Connett, 908 F.2d 521 (9th Cir. 1990) (quoting Conley v. Gibson, 355 U.S. 41, 45-6, 78 S.Ct. 99, 101-2 (1957). In considering the allegations supporting the plaintiffs' claim, the court may consider all material properly submitted to be part of the complaint. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1554 (9th Cir.1990); see also Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir.1988) (stating that the district court may look beyond the complaint to other items in the court record). In reviewing the sufficiency of the allegations, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974). The Court will liberally construe a complaint for civil rights violations drafted by a *pro se* litigant, and will allow an opportunity to amend to overcome any deficiency unless it clearly appears that amendment would be futile. Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980).

In discussing Plaintiff's complaint according to theses standards, it is helpful to distinguish between the allegations

concerning infraction hearings and the allegation of denial of judicial access.

1. The Infraction Hearings

Defendants move to dismiss both Plaintiff's original and supplement claims concerning infraction hearings, on the argument that prison inmates in the state of Washington do not enjoy a Constitutional liberty interest in remaining free from disciplinary action. Clearly, if no liberty interest is at stake, due process is not required. Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 1748 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.")

Liberty interests protected by the Fourteenth Amendment may arise from two possible sources: the Due Process Clause itself and laws of the states, including prison regulations and policies. Walker v. Sumner, ___ F.3d ___, 1994 WL 20667 (9th Cir. January 28, 1994). It is well established that the Due Process Clause does not give rise to a liberty interest in remaining within the general prison population. Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864 (1983). Nor does it afford inmates a right to a specific classification status or corrections facility. Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2531, reh'g denied, 429 U.S. 873, 97 S.Ct. 191 (1976). Further, there is no

inherent constitutional interest in amassing "good time" credits or garnering early release. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974). Thus, Plaintiff must look to Washington state law to establish any due process claim.

A state law or prison regulation creates a liberty interest if it places "substantive limitations on official discretion." Walker, 1994 WL 20667 at *3 (quoting Olim, 461 U.S. at 249, 103 S.Ct. at 1747). This involves a two-step process. First, there must be "particularized standards or criteria to guide the State's decisionmakers." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461, 109 S.Ct. 1904, 1909 (1989). Next, the law or prison regulation must contain explicit mandatory language, such as "shall" or "must", requiring a **particular outcome** if the substantive predicates are met. Conner v. Sakai, 994 F.2d 1408, 1411 (9th Cir. 1993).

Significantly, use of the word "shall" alone is not sufficient. Rather, the liberty interest is created when the work "shall" is used to mandate certain procedures "in connection with requiring specific substantive standards for action." Toussaint v. McCarthy, 801 F.2d 1080, 1098 (9th Cir. 1986). In Toussaint, for instance, California prison regulations contained mandatory procedural requirements for the benefit of prisoners placed in segregation. Id. The Ninth Circuit found that "[s]uch procedural requirements, even if mandatory, do not raise a

constitutionally cognizable liberty interest." Id. (citations omitted). The liberty interest created under California law in Toussaint arose solely from prison regulations which mandated release from segregation status absent specific substantive predicates for continued restrictive detention. Id.

In contrast to the California penal code, the Washington Administrative Code ("WAC") provisions relevant to Plaintiff's claims do not contain specific substantive predicates. WAC 137-28-100 governs authority to impose sanctions, and provides:

> (1) If the hearing officer determines that an inmate is guilty of a serious infraction as enumerated in WAC 137-28-030, he/she may impose one or more of the sanctions provided in WAC 137-28-105.[2]

This language does not specify substantive predicates for a finding of guilt. Indeed, with the exception of WAC 137-28-090 which limits evidence at a hearing to "facts relevant to the alleged infraction, or disposition if an infraction has been found," there are no provisions which narrow the discretion of the hearing officer. The WAC provisions are so broadly permissive that they do not even specify the quantum of proof by which a finding of guilt must be supported. Cf. Conner, 994 F.2d 1408, 1411 (holding that Hawaii prison regulation created

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[2]WAC 137-28-030 defines serious infractions, such as "threatening another with bodily harm or with any offense against his/her person," while WAC 137-28-025 enumerates the lesser general infractions. The sanctions listed in WAC 137-28-105 include restrictive segregation, loss of good time credit, and reclassification of custody status.

liberty interest by guaranteeing inmate "freedom from disciplinary segregation" absent a finding of guilty by "substantial evidence").

Those WAC provisions which are mandatory pertain solely to procedural requirements. For example, WAC 137-28-110 provided:

> (1) No inmate shall be subject to disciplinary action for violation of inmate conduct rules unless there has been reasonable advance notice to the inmate of the specific prohibited behavior.

Similarly, WAC 137-28-090 and WAC 137-28-093 detail the steps to be followed in conducting an infraction hearing, in terms of notice, the inmate's opportunity to be heard, and timely notification of the hearing officer's decision. While these provisions contain mandatory language, they lack **substantive predicates**. Mandatory procedural requirements alone do not give rise to a Fourteenth Amendment liberty interest. Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993) (citing Toussaint, 801 F.2d at 1098).

It is also clear that the procedural mandates contained in the Washington code were never intended to give rise to substantive rights. See Department of Corrections Policy 100.100 (stating "[i]t is not the intent to grant offenders under the jurisdiction of the Department by policy a state-created liberty interest in addition to those rights guaranteed to offenders

under the United States Constitution."). Nor do they have such an effect, since they lack the essential "substantive limitations on official discretion." Walker, 1994 WL 20667 at *3. Absent a liberty interest cognizable under the Fourteenth Amendment, there is no due process violation.

The Court concludes that the permissive language and nonparticularized standards under the Washington code are insufficient to create a liberty interest for Plaintiff to remain free from disciplinary action. The court's conclusion has no impact on any administrative state claim Plaintiff may have. Plaintiff alleges numerous violations of both WAC and Department of Corrections ("DOC") procedures in the conduct of his infraction hearings. "The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of court, but in making that choice the State does not create an independent substantive right." Olim, 461 U.S. at 250-51, 103 S.Ct. at 1748. See Hewitt, 459 U.S. at 471, 103 S.Ct. at 871. Under the standards which govern due process analysis, Plaintiff's original due process complaint and supplemental allegations of retaliatory infraction hearings must be dismissed as a matter of law.

2. Denial of Judicial Access

Defendants also move to dismiss the supplemental allegations of denial of access to the courts as "conclusory,

unsupported and inherently suspect." (Defendants' reply brief, Ct. Rec. 52 at page 7). They offer affidavits of the WSP law librarian and of the property manager in IMU, as well as various WSP records, to support their contention that Plaintiff's claims are unfounded. Plaintiff has submitted numerous affidavits and WSP grievance process documents regarding this issue.

Dismissal under rule 12 (b) (6) must be based on the plaintiff's failure to state a legal claim, rather than his failure to support the factual allegations of his complaint. See Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 1832 (1989). Defendants do not dispute that the Fourteenth Amendment affords inmates meaningful access to the courts, including (1) an adequate law library, and (2) adequate assistance from persons trained in the law. See Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498 (1977). Instead, they contend Plaintiff has not shown any evidence he was denied this right. Defendants' motion is thus more properly regarded as a motion for summary judgment. Both parties have had adequate opportunity to present material outside of the pleadings, making it appropriate for the court to address Defendants' motion in the summary judgment context. Fed. R. Civ. P. 12 (b).

A party is entitled to summary judgment if the documentary evidence produced by the parties permits only one conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

251 (1986). The court must determine if a fair-minded jury could return a verdict for the nonmoving party. Id. at 252. The party seeking summary judgment must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the court that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has carried its burden, the party opposing summary judgment must do more than simply show that there is a scintilla of evidence supporting his claims. Matsushita Elec. Industrial Co. v. Zenith Radio, 474 U.S. 574, 586 (1986). Rather, he must go beyond the pleadings to designate specific facts establishing a genuine issue for trial Id. at 324.

Plaintiff alleges that WSP staff confiscated his legal files, and that he is being denied access to the law library at WSP. The Court previously considered the first of these allegations in denying Plaintiff's Motion to Show Cause regarding Plaintiff's personal belongings (Ct. Rec. 51). In its Order, the Court stated:

> [T]he affidavit of property responsibility signed by Plaintiff prior to his transfer documents "4 boxes" of miscellaneous, including "misc. personal/legal papers." The WSP memorandum to Grievance Officer Debra Sutton reports that 4 boxes were subsequently returned to Plaintiff's new unit on January 12, 1994, following the

> inquiries of defense counsel. . . . Nor has Plaintiff stated which of his legal documents is missing from the returned boxes. . . . The court is satisfied that defense counsel has complied with the court's order to ensure the prompt return of all of Plaintiff's personal property from the WSP property room.

(Ct. Rec. 51 at pages 4-5). Subsequent to the Court's order, Defendants filed an affidavit of WSP property officer Geoffrey Proctor, which confirms that Plaintiff's legal files are in the IMU property room and available upon request. (Ct. Rec. 52, Ex. "Y").

It is undisputed that some of Plaintiff's requests for access to his property have been denied. Mr. Proctor states that these requests were unreasonably broad, and that Plaintiff was informed to request legal materials needed for a pending case by specifying the case name or number. There is no indication in the record whether Plaintiff has yet done so, although Mr. Proctor indicated he will assist Plaintiff in clarifying his request form, and even consider providing Plaintiff all of his files at once, if "there is a reasonably limited amount of legal material." (Ct. Rec. 52, Ex. "Y" at page 2).

The affidavit of WSP law librarian Martin Manahan states that Plaintiff made requests for legal materials from the library on three separate occasions. "He requested a total of seven items, received six, and will receive the last item shortly." (Ct. Rec. 52, Ex. "X" at page 2). While the time, place, and

manner of an inmate's library use may be regulated by WSP, such regulation does not violate the Fourteenth Amendment. See Linquist v. Idaho St. Bd. of Corrections, 776 F.2d 851, 858 (9th Cir. 1985). Plaintiff fails to show that his access to library materials has been restricted, much less unreasonably restricted.

Based on the affidavits of Plaintiff, Mr. Proctor and Mr. Manahan, as well as the records previously considered in denying Plaintiff's motion to show cause, the Court remains satisfied that Plaintiff has access to his legal materials and to the law library. His access was adequate to allow him to file numerous, thoroughly prepared documents with this Court, and to appeared at telephonic hearings. His repeated allegation that he is the victim of a conspiracy to deny his access to this Court is unsupported by specific facts. Thus, Plaintiff has failed to raise a genuine issue of material fact to support his denial of access claim. Defendants' motion for summary judgment on this claim must be granted.

Plaintiff does not object to Defendants' motions to file an overlength brief in support of their motion to dismiss (Ct. Rec. 31). This motion is granted.

In light of the Court's rulings dismissing Plaintiff's due process claims, and granting summary judgment on Plaintiff's denial of judicial access claim, Plaintiff's motions for a stay, and for notification regarding property (Ct. Rec. 53, parts 1 and 2)

are moot. Defendants' motion for expedited hearing (Ct. Rec. 34) is also moot.

IT IS HEREBY ORDERED.

1. Defendants' Motion for Dismissal with respect to Plaintiff's original and supplemental due process claims (Ct. Rec. 30) is **GRANTED.**

2. Defendants' Motion for Dismissal with respect to Plaintiff's supplemental claim for denial of judicial access (Ct. Rec. 30) is **CONSIDERED A MOTION FOR SUMMARY JUDGMENT AND IS GRANTED.**

3. Plaintiff's complaint is **DISMISSED WITH PREJUDICE.**

4. Defendants' Motion to file an overlength brief (Ct. Rec. 31) is **GRANTED.**

5. Plaintiff's Motion for a stay, and for notification regarding property (Ct. Rec. 53, parts 1 and 2 is **DENIED AS MOOT.**

6. Defendants' Motion for expedited hearing (Ct. Rec. 34) is **DENIED AS MOOT.**

IT IS SO ORDERED:

The clerk is directed to enter this order, enter judgment accordingly, and furnish copies to Plaintiff and counsel for Defendants.

DATED this 26th day of April 1994.

/s/ Fred Van Scikle
FRED VAN SICKLE
United States District Judge

[FILED]
[May 31, 1994]

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS-93-120-FVS

ORDER DENYING DEFENDANTS' MOTION FOR PUBLICATION

NORMAN GOTCHER, JR.,

Plaintiff,

v.

TANA WOOD, et al.,

Defendants.

BEFORE THE COURT is Defendants' Motion for Publication of the Court's Order Granting Defendants' Motion to Dismiss, considered without oral argument on May 23, 1994.

Defendants believe that publication is appropriate because the order of dismissal has broad ramifications for the State of Washington in opposing lawsuits based on prison disciplinary proceedings. The Court disagrees. Plaintiff's claims were dismissed because of his failure to identify a federal or state created liberty interest giving rise to due process claims. The

decision was controlled by the long line of authority following the landmark case of Wolff v. McDonnell, 418 U.S. 539 (1974). The Court's Order did not announce novel or noteworthy principles suitable for publication.

Moreover, the Order dismissing Mr Gotcher's claims also disposed of several procedural issues regarding an overlength brief and the mootness of other motions. These matters have no relevance beyond the instant case, and are not appropriate for publication. Therefore,

IT IS HEREBY ORDERED: Defendant's Motion for Publication is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to Plaintiff and counsel for Defendants.

DATED this 26th day of May 1994.

/s/ Fred Van Sickle
FRED VAN SICKLE
United States District Judge

[FILED]
[July 11, 1995]

APPENDIX E

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35484

D.C. No. CV-93-00120-FVS

ORDER

NORMAN GOTCHER, JR.,

Plaintiff-Appellant,

v.

TANA WOODS, et al.,

Defendant-Appellee.

The Motion for Supplemental Briefing in Light of New Supreme Court Decision is granted.

The parties are requested to file supplemental letter briefs of not longer than five pages, limited to the following question: What effect, if any, does the decision of the Supreme Court in Sandin v. Conner, No. 93-1911, 63 U.S.L.W. 4601 (June 19, 1995), have on the resolution of this appeal?

The briefs shall be filed with the Clerk of the Court no later than July 27, 1995.

FOR THE COURT

CATHY A. CATTERSON
CLERK OF THE COURT

_____
Deputy Clerk

[FILED]
[November 27, 1995]

APPENDIX F

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 94-35484

D.C. No. CV-93-00120-FVS
(Eastern Washington)

ORDER

NORMAN GOTCHER, JR.,

Plaintiff-Appellant,

v.

TANA WOOD, et al.,

Defendant-Appellee.

Before: BEEZER and HAWKINS, Circuit Judges, and TEVRIZIAN*, District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

[FILED]
[August 24, 1993]

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-0120-FVS

SECOND AMENDED COMPLAINT
WITH A JURY DEMAND

NORMAN GOTCHER JR.,

Plaintiff,

v.

TANA WOOD, WAYNE HELGESON
ALAN WALTER,
JULIUS VAN SKIKE, Lt. G.
EDWARDS, RICK ALT,
Lt. LAWSON

Defendants.

CIVIL RIGHTS COMPLAINT
WITH A JURY DEMAND

This is a Civil Rights Action under 42 U.S. § 1983 Filed by NORMAN GOTCHER JR., A State Prisoner, alleging Violation of His Constitutional Rights and Seeking Money Damages, Declaratory Judgment, and Injunctive Relief. Plaintiff - Requests a Trial by Jury.

JURISDICTION

1. This is a Civil Rights Action, Under 42 U.S.C. § 1983. This Court has Jurisdiction under 28 U.S.C. 1331 § and 1343. Plaintiff also invokes the Pentent Jurisdiction of this Court.

VENUE

2. Venue is proper in this Court Pursuant to 28 U.S.C. 1391 (b). The Claims Set Forth in this Complaint Occurred in Connell Wash, at Coyote Ridge Camp, And also at Walla Walla State Penitentiary, In Walla Walla: Wash. Eastern District.

PARTIES

(a). Plaintiff, NORMAN GOTCHER JR., Is presently incarcerated at Washington State Penitentiary, Walla Walla (WSP).

(b). Defendant - TANA WOOD - Superintendent of Walla Walla State Penitentiary (W.S.P.)

(c). Defendant - WAYNE HELGESON - Associate Superintendent of Walla Walla State Penitentiary (W.S.P.)

(d). DEFENDANT - ALAN WALTER - M.S.C. Baker Unit Counselor of Walla Walla State Penitentiary (W.S.P.)

(e). Defendant - RICK ALT - Of M.S.C. Building as a Committee Classification Member of Walla Walla State Penitentiary (W.S.P.)

(f). Defendant - JULIUS VAN SKIKE - M.S.C. CCIII Review Committee Chairperson for Classification Hearings of Walla Walla State Penitentiary (W.S.P.)

(g). Defendant - Lt. G. EDWARDS - Of M.S.C. Building as a Major Hearings Officer.

(h). Defendant - Lt. LAWSON - Of M.S.C. Building as a Committee Classification Member of Walla Walla State Penitentiary (W.S.P.)

The Name's From B-H Caused and Personally Participated in

Causing the alleged deprivation of Plaintiff's Constitutional Right's.

Each party is Guilty of Violating Plaintiff's Equal Protection which Guarantee's Plaintiff's Due Process Rights to the Fifth Amendment of the United States Constitution's, State And Federal.

FACTS

NO. 1 Amended Complaint.

(A). Lt. TERRY WALDHER - On 9-16-1992 at 1445 hrs. Plaintiff was Denied His Right's to Due Process and Equal Protection, By not being Afforded Witnesses, 24 hr's Advance Notice, Document's, and Statement's Etc.

(B). Wac - Rule 137-28-085 Thus through these rule's of the Department of Correction's for Disciplinary Hearing. The Plaintiff should have been afforded the right to Call Witnesse's, And Cross Examine Witnesse's, or have a written Statement or Read into the Record Plaintiff is Not being Allowed to have thee Existing Rule's Apply in their Fullest Compacity.

No. 2 ALAN WALTER:

Made a Custody override decision concerning the Demotion of the Plaintiff's Custody Status, Based upon an Illegal Disciplinary Action by the Above Mentioned Lt. WALDHER., The Action's by MR: WALDHER; were outside the only written policie's and proceedure's Of WAC-Rule's 303.70, 304.10, 305.40 And Mo-70-2 Due Process in transferring residents between Adult Correction Institution's. None of the processe's Connected with these Extablished policie's and proceedure's were Applied to Plaintiff Situation, therefore again a Denial of Due Process and Equal Protection Accured.

To insure an on going Denial of Due Process and Equal Protection

On 10-13-1992 Lt. Edwards, Acted in the same Compacity as Lt. Waldher; By Dening Plaintiff His Witnesse's or Another 24 hr's Advance Notice: This was done to a

CONTINUED.

Disciplinary Hearing with Quasi Jurisdictional question's. (1). The Mis-Conduct Report was issued at Coyote Ridge, (2). The Disciplinary Hearing was held at the M.S.C. Facility. (3). The Plaintiff was transfered to the Washington State Penitentiary as a Result. (4). Up on Review of the WAC 137-28- Procedure's and a Brief Conference with Supt: TANA WOOD; It was revealed that a Mis-Conduct Report issued at Coyote Ridge Couldnot be Transfered to M.S.C. or W.S.P. for Judication.

(C). Plaintiff has been denied His Due Process Right's, Because the Defendant's didnot Follow the Existing policie's and proceedure's for the Demotion of Custody and the Exstablished Rule Concerning Mis-Conduct Report and Disciplinary Hearing at the Individual Institution's.

(D). On or about 10-14-1992 ALAN WALTER: And the Board Member's: JULIUS VAN SKIKE, RICK ALT, Lt. LAWSON : Did Continue to Contribute to Denial of Due Process Right's, And Equal Protection, by holding a Classification Hearing to cover up the Already Demoted Custody - Status.

Plaintiff wishe's to point to the Court's Attention Once again that W.S.P. Policy No. 303.70, 304.10 305.10 305.20 Were Not Applied to insure any Fairness towards the Plaintiff Situation.

(E). On or about 10-15-1992 Plaintiff Contend's that Directly or Indirectly the Final Blow Delivered by Correctional Official's came from the Reccomendation of Supt: Tana Wood, and Assoc. Supt: Wayne Helgeson. In that their Reccomendation's Supported the Final Result's the Plaintiff Denial of Due Process, and Equal Protection.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CS-93-0120-FVS

SWORN AFFIDAVIT TO
SECOND AMENDED COMPLAINT

NORMAN GOTCHER JR.,

Plaintiff,

v.

TANA WOOD, WAYNE HELGESON
ALAN WALTER, RICK ALT
JULIUS VAN SKIKE, Lt. G.
EDWARDS, Lt. LAWSON

Defendants.

I Mr: Norman Gotcher Jr, being first duly sworn upon oath, do hereby Certify that all the Fact's and Statement's In Plaintiff Second Amended Complaint are Very True and Correct to the best of Plaintiff Knowledge.

Plaintiff also hope that the Court and Court Clerk do except and forward this Claim in Good Faith by the Violation's Mentioned and Stated as the Court has told me to Correct and Reshape and Re-Amend by the Rules And Procedure's without the Ciations to the Court's Experience and Knowledge.

I Thank The Court, And Court Clerk of Allowing

Me with such the extended opportunity.

/s/ Mr. Norman Gotcher, Jr
NORMAN GOTCHER JR., #634076/8w-A-2
Washington State Penitentiary
P.O. Box 520
Walla Walla: WA. 99362

SUBSCRIBED AND SWORN to before
me this 17th day of Aug., 1993
residing as a Notary Public at Walla Walla Prison

/s/Martin A. Manahan
NOTARY PUBLIC in and for the State of Washington

My Commission Expires: 3/10/97. [SEAL]

APPENDIX H

Chapter 137-28 WAC
PRISONS--DISCIPLINE

WAC 137-28-005 Purpose. (1) The rules in this chapter shall provide a standardized system consistent with constitutional due process for ascertaining whether misconduct by an inmate of an adult correctional institution has occurred.

(2) The rules in this chapter shall not apply to proceedings of the board of prison terms and paroles.

. . .

WAC 137-28-006 Definitions. For the purposes of this chapter the following words shall have the following meanings:

. . .

(6) "Good-conduct time credits" means that portion of an inmate's potential reduction to his/her minimum term which is authorized by RCW 9.95.070 and 72.09.130 and which is gained by not receiving serious infractions as listed in WAC 137-28-030.

. . .

WAC 137-28-010 Supplementary rules. The superintendent of an adult correctional institution may promulgate local supplementary rules, policies, and procedures including the creation of new general and/or serious infractions, the reclassification of general and/or serious infractions set out in these rules, and the creation of new sanctions. All such new or reclassified infractions and sanctions shall be approved in writing by the director before being put into effect.

WAC 137-28-015 Notification. (1) Each inmate of an adult correctional institution shall be advised in writing of:

(a) His/her rights and responsibilities;

(b) Acts prohibited in the institution; and

(c) Disciplinary action which may be taken in the event of misconduct.

(2) Each inmate upon entering the custody of the department of corrections shall be given a copy of the rules in this chapter and of all local disciplinary rules of the institution to which he/she is assigned.

(3) All amendments or additions to this chapter and all amendments or additions to local disciplinary rules, policies, and procedures shall be posted at a specifically designated place or places in each institution in advance of their effective date if

possible and for at least thirty days after their effective date. Inmates shall be responsible for informing themselves of such postings. Complete and up-to-date copies of these rules and all local rules shall be available at each institution for inmate examination.

(4) The superintendent shall ensure that each inmate has the opportunity to understand rules which relate to his/her conduct. If the inmate is unable to read or understand English, the rules shall be read to him/her promptly in his/her accustomed language.

WAC 137-28-020 Definition of misconduct. Misconduct shall consist of:

(1) Any act described in WAC 137-28-025 as a general infraction;

(2) Any act described in WAC 137-28-030 as a serious infraction; or

(3) Any act proscribed by a rule adopted by an institution pursuant to WAC 137-28-010.

WAC 137-28-025 General infractions. Any of the following types of behavior shall constitute a general infraction:

051 - Unauthorized possession of money or other negotiable instruments totaling less than five dollars;

052 - Loaning of property for profit;

053 - Possession of anything not authorized for retention or receipt by an inmate and/or not issued to him/her by regular institutional channels;

055 - Mutilating, altering, defacing or destroying items issued by the state the value of which is less than five dollars;

103 - Refusing to obey a lawful order of any staff member;

104 - Unexcused absence from work or any assignment;

110 - Theft of food;

202 - Abusive language directed to a staff member;

203 - Lying to a staff member;

205 - Participating in a meeting or gathering that has been disapproved in advance, in writing, by the institution administrative staff;

210 - Being in an area identified by an institution as an area where the presence of inmates is unauthorized;

211 - Failure to follow published safety or sanitary regulations;

212 - Using any equipment or machinery which is not specifically authorized;

213 - Using any equipment or machinery contrary to instructions or posted safety standards;

214 - Failure to stand count;

251 - Smoking where prohibited;

301 - Failure to keep one's person and one's quarters in accordance with published and posted standards, rules, or regulations;

302 - Tattooing or self-mutilation;

303 - Unauthorized use of mail or telephone;

305 - Correspondence or conduct with a visitor in violation of published and posted regulations;

351 - Giving, selling, or trading money or anything of value to, or accepting or purchasing money or anything of value from another inmate, a member of his/her family, or his/her friend, except when authorized; or

400 - Attempting to commit any of the above offenses, or aiding another person to commit any of the above offenses shall be considered the same as the commission of the offense itself.

WAC 137-28-030 Serious infractions. Any of the following types of behavior shall constitute a serious infraction:

501 - Committing homicide;

502 - Assaulting any person which results in the hospitalization of the person assaulted;

503 - Extortion, blackmail, demanding or receiving money or anything of value in return for protection against others, or under threat of

informing;

504 - Engaging in sexual acts with others, with the exception of conjugal visits authorized by the superintendent;

505 - Fighting with any person except in self-defense;

506 - Threatening another with bodily harm or with any offense against his/her person;

507 - Committing an act not otherwise proscribed by these regulations which constitutes a felony or misdemeanor under state or federal law;

508 - Throwing objects or material at staff members, institution visitors, or other inmates;

521 - Holding a person hostage;

525 - Violation of conditions of furlough;

550 - Escape or attempted escape;

551 - Lying to the disciplinary hearing committee or hearing officer;

552 - Attempting or causing an innocent person to be penalized or proceeded against by lying to a staff member;

553 - Setting a fire;

554 - Destroying or damaging state property, or the property of another person in excess of five dollars;

555 - Stealing (theft)/possession of stolen property;

556 - Refusing to submit to a body search when lawfully ordered to do so by a staff member;

557 - Refusing and/or failing to work or attend other regularly scheduled assignments;

558 - Interfering with a staff member in the performance of his/her duties;

559 - Gambling;

600 - Tampering with or blocking any locking device or seal;

601 - Possession or introduction of an explosive or any ammunition or components thereof;

602 - Possession or introduction of any gun, firearm, weapon, sharpened instrument, knife, or poison or components thereof;

603 - Possession, introduction, transfer, or use of any narcotics, controlled substance; possession of more than 15 grams of marijuana; possession, transfer, or use of any intoxicant or drug not prescribed or authorized for the inmate or for the inmate to whom transferred, if applicable, by the medical staff;

605 - Unauthorized possession of any officer's or staff's clothing;

607 - Refusing to submit to a urinalysis when ordered to do so by an authorized staff member;

608 - Refusing to submit to a breathalyzer or other standard sobriety test;

650 - Rioting;

651 - Inciting others to riot;

652 - Engaging in or inciting a prohibited group demonstration or developing an unauthorized club or organization;

653 - Interfering with the taking of count;

654 - Counterfeiting, forging or unauthorized reproduction of any document, article of

identification, money, security, or official paper;

655 - Making intoxicants, controlled substances, narcotics;

656 - Giving or offering any official or staff member or a volunteer a bribe or anything of value for a favor or unauthorized service;

657 - Four or more general infractions arising out of separate incidents, all of which occur within the previous six-month period, and which have been reported in writing;

658 - Failure to perform according to an administrative action taken pursuant to WAC 137-28-050(2), or resisting posthearing sanctions as provided for in WAC 137-28-105;

660 - Unauthorized possession of money or other negotiable instruments of five dollars or more;

661 - Performing or taking part in performing a marriage in the institution buildings or on the institutional grounds, except when such marriage was approved by the superintendent of the institution, which may, in appropriate cases, also be deemed a violation of a visiting rule that can subject an inmate to the sanction contained in WAC 137-28-105(1)(d), as well as other sanctions available for serious infractions;

662 - Solicitation of goods and/or services for which the provider would expect payment when the inmate knows or should have known he/she has no funds available to pay for such goods or services;

663 - Strongarming; use of physical force or coercion for personal gain against any inmate or staff member;

700 - Attempting to commit or aiding another person to commit a serious infraction as enumerated in this rule, and such action shall be considered the same as commission of the offense itself;

701 - Commission of any general infraction as enumerated in WAC 137-28-025 or any local rule denominated as a general infraction in such a manner as likely to result in danger to life or limb or to create a risk to the orderly operation of the institution or the health and safety of its inmates, staff, or visitors shall be considered a serious infraction, provided there is substantial evidence which establishes there was such a danger;

702 - Possession of an unauthorized tool;

703 - Being under the influence of intoxicants, or possession of less than 15 grams of marijuana, or under the influence of an unauthorized drug, narcotic, controlled substance, or other intoxicant; or

704 - Assaulting any person which does not result in the hospitalization of the person assaulted.

WAC 137-28-045 Infractions--Report on. (1) In the event of a general infraction a staff member may prepare and submit an infraction report. In the event of a serious infraction the staff member shall prepare and submit an infraction report.

(2) The infraction report shall include:

(a) A description of the incident;

(b) The time and place of the incident;

(c) The names of witnesses;

(d) The specific rule alleged to have been violated;

(e) A description of any action taken; and

(f) A recommendation of any action to be taken.

(3) The infraction report shall be signed by the staff member and submitted promptly to the supervisory employee or unit team designated by the superintendent to receive such reports.

WAC 137-28-075 Prehearing procedures--Rights of inmates. (1) Before being questioned about an alleged rule infraction, an inmate alleged to have committed a rule infraction shall be advised that his/her refusal to testify at the hearing may be used against him/her.

(2) The inmate shall retain his/her institutional status and corresponding rights and privileges prior to and during the hearing except as provided in WAC 137-28-080.

WAC 137-28-085 Hearing officer--Preparation for hearing. In preparation for the hearing, the clerk of the hearing officer shall at least twenty-four hours in advance of the hearing:

(1) Provide copies of the infraction report to the inmate;

(2) Advise the inmate, both orally and in writing, of

his/her rights, subject to the relevant provisions and limitations of these rules:

(a) To have a hearing;

(b) That if he/she chooses not to testify at the hearing, his/her silence may be used against him/her;

(c) To present written statements from other inmates, staff or other persons in his/her behalf;

(d) To ask that staff members, other inmates, and other persons be present as witnesses for the hearing if it is determined by the hearing officer that to do so would not be unduly hazardous to institution's safety or correctional goals: *Provided, however,* Limitations may be made by the hearing officer if the information to be presented by the witnesses is deemed to be irrelevant, duplicative, or unnecessary to the adequate presentation of the inmate's case;

(e) To have a staff advisor to assist in preparation/presentation of his/her case when it is determined that the inmate is unable to adequately represent himself/herself on the basis of literacy or competence in accordance with WAC 137-28-097; and

(f) To have access to nonconfidential reports and records utilized by the hearing officer during the fact-finding stage: *Provided, however,* Where reports and records contain information, the disclosure of which to an inmate might

reasonably compromise the security and/or safety of the institution or its inmates, such reports and records shall be specifically identified as confidential and withheld, and in such cases, the inmate shall be provided with a summary of such written documents with the classified information deleted.

(3) Obtain written acknowledgment of the receipt by the inmate of the information provided in accordance with WAC 137-28-085(2);

(4) Determine from the inmate whether he/she wishes to contest the allegation;

(5) Schedule the hearing within three working days after discovery of the incident, unless such time is extended by the superintendent; and

(6) Notify any staff member who witnessed the infraction of the hearing.

WAC 137-28-090 Conduct of hearing. (1) The hearing officer shall assure that the inmate is capable of understanding the charge against him/her, the nature of the proceedings, and is able to adequately take part in the hearing. If there is reason to doubt the inmate's understanding or ability, the hearing officer may order a postponement of the hearing in order to obtain additional information on the inmate's mental

status. If the report indicates the inmate is not able to understand and/or take part in the proceedings, the hearing officer may proceed with the hearing with the inmate being fully assisted by a staff advisor appointed under WAC 137-28-097.

(2) The inmate shall be present at all stages of the hearing except during the decisional deliberations and any inquiry the hearing officer may wish to make concerning the identity of unidentified witnesses. An inmate may waive his/her presence at a hearing.

(3) The inmate shall be informed that if he/she chooses not to testify in the hearing, his/her silence may be used against him/her.

(4) the clerk shall be responsible for presenting all appropriate paperwork to the hearing officer, but shall not be responsible for orally presenting facts and circumstances surrounding the incident.

(5) The hearing officer shall divide the hearing into two stages consisting of:

(a) Determination of the guilt or innocence of the inmate; and

(b) Determination of further action to be taken.

(6) Evidence, testimony, questions, and examinations shall be limited to facts relevant to the alleged infraction, or disposition if an infraction has been found.

(7) Where institution staff members are witnesses against the inmate, a written statement from the staff member may be considered by the hearings officer instead of in-person testimony, except where the hearing officer determines that the staff member's presence is necessary to an adequate understanding of the issues in the case.

(8) The hearing officer shall have the authority to cross-examine the staff member reporting the infraction.

(9) The inmate shall be allowed to call witnesses and present documentary evidence in his/her defense when permitting him/her to do so will not be unduly hazardous to institutional safety or correctional goals unless the witness and/or information desired to be presented is deemed to be irrelevant, immaterial, unnecessarily duplicative of other information before the hearing officer, or otherwise found to be unnecessary to the adequate presentation of the inmate's case. The testimony of all witnesses from outside the institution shall be considered in writing. In the event the hearing officer determines that the presence of a witness is appropriate, the hearing officer will call the witnesses or continue the hearing until such time as the witness is available. If the witness is unavailable, the hearing officer may, in his/her discretion, consider the written testimony previously submitted.

(10) The inmate may question witnesses against him/her in the discretion of the hearing officer. If the hearing officer determines that an inmate witness would be subject to risk of harm if his/her identity were disclosed, testimony of the inmate witness may be introduced by the testimony of a staff member to whom the information was provided by the inmate witness and/or the affidavit of the inmate witness. If the staff member to whom the inmate witness provided information is, for good cause, unavailable, the written statement of such uninvolved staff member may be used.

(11) The hearing officer shall, out of the presence of all inmates, inquire as to the identify of any anonymous inmate witness, and as to how the testifying staff member received such information. The refusal of the staff member presenting the testimony of the unidentified inmate witness to identify such inmate shall make the testimony inadmissible unless the refusal to identify the witness is approved by the superintendent or acting superintendent who personally determines that there is good cause for nondisclosure and that the informant is reliable. This decision may not be delegated beyond the superintendent or acting superintendent. The hearing office must make an independent determination as to the reliability of informant and credibility of information offered, except that the hearing officer may accept an assurance of credibility from the superintendent

or acting superintendent who approves the nondisclosure of identity of the inmate witness.

WAC 137-28-093 Decision of hearing officer. (1) A report of the hearing shall be made by a secretary and shall include the charge, names of witnesses, summary of the testimony and cross-examination, a description of the physical evidence used, and the decisions and reasons therefore. The written report shall be placed in the inmate's institutional file if he/she is found guilty. All reports shall be maintained by the clerk as part of the hearing officer's records. A complete taped record of the hearing shall be taken but the tape shall not become a part of the inmate's file, and may be destroyed one hundred twenty days after the date of the hearing or the appeal decision, or any court proceedings resulting from the hearing, whichever is later.

(2) In reaching its decision on the guilt or innocence of the inmate, the hearing officer must rely solely on evidence presented in the hearing. However, during the dispositional stage of the hearing, such factors as the inmate's institutional file, prior conduct, and overall institution adjustment may be considered.

(3) The inmate shall be informed personally of the

decisions of the hearing officer. Such information shall be given to him/her orally within twenty-four hours of the hearing and in writing within seventy-two hours of the hearing unless such periods are extended by the superintendent.

(4) The inmate shall be informed of his/her right to appeal the decisions of the hearing officer to the superintendent.

WAC 137-28-095 Finding of no infraction. If the hearing officer determines that no infraction occurred, the inmate shall be reinstated to his/her previous status and all records pertaining to the charge shall be removed from the inmate's central file but may be retained for statistical and record-keeping purposes.

WAC 137-28-100 Sanctions--Authority to impose. (1) If the hearing officer determines that an inmate is guilty of a serious infraction as enumerated in WAC 137-28-030, he/she may impose one or more of the sanctions provided in WAC 137-28-105.

(2) If the hearing officer determines that more than one infraction occurred, he/she shall not impose consecutive sanctions for the separate infractions but shall consider them

together and impose penalties for the group of infractions.

(3) The hearing officer may suspend the execution of a proposed disciplinary sanction for a fixed period of time, not to exceed six months, subject to the good behavior of the inmate and/or meeting other conditions as specified by the hearing officer. If the subsequent behavior of the inmate is appropriate, the hearing officer shall, at or prior to the end of the fixed period, cancel execution of the penalty. A suspended sentence may be revoked upon the inmate's being found guilty of either a general or serious infraction and/or violating the conditions attached to the original suspension. A suspended sentence may be revoked only by the institution hearing officer following notice to the inmate of possible revocation and an in-person meeting with the inmate.

(4) The hearing officer may review any decision he/she has previously made and may modify downward any sanction previously imposed.

(5) Sanctions shall not be imposed while an appeal from the hearing officer's decision is under consideration by the superintendent.

(6) In all cases, regardless of whether an appeal is taken, the superintendent may review a sanction imposed and may reduce its severity.

WAC 137-28-105 Sanctions--Types. (1) For general infractions enumerated in WAC 137-28-025 or classified as general infractions by supplementary local rules, one or more of the following sanctions may be imposed:

(a) Reprimand and/or warning;

(b) Loss of specified privileges for not more than ten days on a first offense, twenty days on a second offense, and thirty days on a third offense within a six-month period;

(c) Confinement to room or cell except for attendance at work or school assignment, religious service, or meals, not to exceed ten days;

(d) Interruption or termination of correspondence or visiting with specified individuals for a maximum of ninety days, when there has been an infraction of rules on visits or correspondence as stated in chapters 137-48 and 175-80 WAC or in local rules regarding correspondence and/or visitors; and

(e) Up to one hundred twenty hours of extra work duty.

(2) for serious infractions enumerated in WAC 137-28-030, one or more of the following sanctions may be imposed:

(a) Any of the sanctions enumerated in this section;

(b) Loss of specified privileges for a period of time not to exceed twenty days except that an inmate shall not be deprived of an opportunity for daily exercise;

(c) Evening lockup or confinement to quarters for ten

days;

(d) Weekend and/or holiday lockup or confinement to quarters for a thirty-day period. For purposes of this rule, a "weekend" shall be deemed to begin at the end of the Friday workday;

(e) Confinement to cell except for meals, or with meals in cell, with or without curtailment of job assignment for a period not to exceed ten days;

(f) Recommendation to the classification committee/classification officer for reconsideration of custody classification and/or, when the infraction committed is directly related to the inmate's program, recommendation of program change;

(g) Recommendations to the classification committee/classification officer for transfer to another institution only when, as a result of the infraction committed, the inmate is unable to function in the institution of present confinement, or if other disciplinary methods have been attempted and failed;

(h) Transfer to the maximum security or segregation section, for a period not to exceed thirty consecutive days;

(i) Confinement in an isolation cell for period not to exceed ten consecutive days: *Provided*, That where a serious infraction occurs during a period of isolation imposed under this rule, additional periods of isolation not to exceed ten days may

be imposed: *Provided further*, That in such situation when an inmate may be in isolation for more than ten consecutive days, the director's prior approval shall be required unless the inmate is released from isolation at least for seventy-two consecutive hours between the expiration of one isolation sentence and the imposition of another, where the combined time would exceed ten consecutive days;

(j) Restitution for damage done to any property or loss of any property assigned to the inmate. Funds may be withdrawn from the inmate's account to make restitution under this rule: *Provided*, That an inmate's account shall not be reduced to less than five dollars under this subparagraph;

(k) Recommendation to the superintendent that he/she not certify good conduct time credit for an inmate to the board of prison terms and paroles, pursuant to RCW 9.95.070 or that he/she deny good conduct time credit for those inmates not under jurisdiction of the board. Such recommendation will be consistent with guidelines established by the secretary of the department of corrections. Any sanctions for loss of good-conduct credits in excess of the guidelines established by the secretary of the department of corrections must have final approval by the director, division of prisons. For inmates not under the board's jurisdiction, all awards of good conduct time shall be considered tentative and therefore all good conduct time

credits earned or to be earned may be addressed under this rule;

(l) Recommendation to the board of prison terms and paroles for a disciplinary hearing or reconsideration of minimum term should occur only with infractions providing for actual time loss of twelve months or more and consistent with guidelines established by the department;

(m) The sanction for the following major infractions will not result in loss of good-time credit: 557; 559; 653; 657; 661; and 701.

WAC 137-28-110 Sanctions--Limitations. (1) No inmate shall be subject to disciplinary action for violation of inmate conduct rules unless there has been reasonable advance notice to the inmate of the specific prohibited behavior unless such rule has been adopted on an emergency basis.

(2) Lowering the quantity or quality of food and deprivation of clothing, bedding, bed, or normal hygienic implements shall not be used as sanctions.

(3) Corporal punishment and physical restraint shall not be used as sanctions.

(4) An inmate placed in segregation shall:

(a) Be confined to an environment with healthful temperatures in cells substantially similar to those used for

general population;

(b) Be provided the same opportunities for personal hygiene as are available to the general population;

(c) Be afforded his/her rights to correspondence, reading, and legal representation;

(d) Be provided daily opportunity for at least one hour of exercise unless staffing, space, institutional security, order and/or safety, or other similar circumstances make this unfeasible, in which cases such inmate shall be allowed as much exercise as is feasible in the judgment of staff; provided, however, any limitations of exercise shall be approved in advance by a staff member with the rank of lieutenant or higher; and

(e) Be visited by a physician or designated health care personnel at least three times per week; provided, however, if a physician has not personally visited the inmate for three consecutive days, a physician shall review the condition of the inmate with the health care personnel who have visited and shall review written comments and requests, and a record of visits by medical personnel shall be maintained; and provided further that inmates of forestry honor camps or small correctional institutions, as so designated by the director, shall receive medical care and observation in accordance with standard procedures in effect at such facility specified by the director of

prisons.

(5) An inmate placed in isolation shall:

(a) Be confined in an environment with healthful temperatures in cells substantially similar to those used for the general population;

(b) Be provided the same opportunities for personal hygiene as are available to the general population;

(c) Retain his/her rights to correspondence, reading, and legal representation except that literature may be limited to educational, religious, legal, or program involvement material;

(d) Be visited by a physician or health care personnel at least once per day; provided, however, if a physician has not personally visited the inmate for three consecutive days, a physician shall review the condition of the inmate with the health personnel who have visited and shall review written comments and requests, and a record of visits by medical personnel shall be maintained; and provided, further, that inmates of forestry honor camps or small correctional institutions, as so designated by the director, shall receive medical care and observation in accordance with standard procedures in effect at such facility to be specified by the director of prisons;

(e) Upon approval by he superintendent, be released immediately to an appropriate setting when medical personnel recommends such release on medical or psychological grounds;

(f) Be visited by a staff member at least twice during each daily shift to ascertain his/her well being, and each such visit and findings shall be recorded; and

(g) Be accessible to the counselor assigned to him/her.

WAC 137-28-115 Appeal to superintendent. (1) An inmate may appeal the decision of the hearing officer to the superintendent by filing a written request for review and his/her reasons therefor with the clerk within twenty-four hours, exclusive of weekends and holidays, after receiving written notice of the decision of the hearing officer. The superintendent may, in his/her discretion, consider appeals filed beyond the twenty-four hour period.

(2) The clerk shall promptly transmit the request for review and the hearing officer record to the superintendent.

(3) The superintendent shall act on the request within five working days of its receipt by affirming the decision of the hearing officer, stating his/her reasons therefor; reducing the severity of the sanctions imposed; vacating the judgment of the hearing officer, or remanding the matter for a new hearing. Any new hearing may not result in an increase of the severity of the sanctions originally imposed.

(4) Pending the decision of the superintendent, the

sanctions shall not be imposed on the inmate nor shall his/her custody be subject to change unless there are grounds for detention as provided in WAC 137-28-080 or if the superintendent has reason to believe that he/she is a substantial security risk.

(5) The inmate shall promptly be notified of the decision of the superintendent.

(6) In all cases where the superintendent approves a sanction requiring the loss of more than one hundred eighty days of future good conduct time credits, or the superintendent recommends that a parole board disciplinary hearing be scheduled, the case will be referred to the director for review and approval. This review may result in approval of the sanction imposed or a lesser sanction.

APPENDIX I

POLICY

DEPARTMENT OF CORRECTIONS

POLICY NUMBER

100.100

TITLE

DEPARTMENT OF CORRECTIONS POLICY, DIRECTIVE, AND FIELD INSTRUCTION DEVELOPMENT

EFFECTIVE DATE: October 15, 1992

AUTHORITY:

General authority of the Secretary of Corrections to manage and direct the Department, RCW 72.09.050.

PURPOSE:

To revise and establish the system for developing, compiling, maintaining, and disseminating policies, directives, field instructions, and procedures for the operation of all units within the Department.

. . .

POLICY:

It is the purpose of Department policy to guide the Department personnel in the conduct and performance of their duties. It is not the intent to grant offenders under the jurisdiction of the Department by policy and state-created liberty interest in addition to those rights guaranteed to offenders under the United States Constitution.

. . .

APPENDIX J

DEPARTMENT OF CORRECTIONS
CLASSIFICATION REFERRAL

PACKET:
[ ] CAMP ASSIGNMENT
[ ] COMMAND MANAGER
[ ] DIRECT COMMUNITY SERVICES
[ ] HCSC
[ ] CHIEF, CLASSIFICATION & TREATMENT
[x] NO ACTION REQUIRED

REVIEW PERIOD _____ TO _____

FACILITY/LIVING UNIT: WSP/MSC/BAKER

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1. REFERRAL AGENT: ALAN WALTER, CCIII [/s/AW]
   DATE: 10/20/92

2. MX ED: 7/21/97

3. NRD: 2/93

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4. REVIEW OF CLASSIFICATION FOR:

[ ] INITIAL (RC)	[ ] Camp	[ ] W/R
[ ] Six Month Review	[ ] Ad Seg	[ ] PPR
[ ] Board	[ ] Transfer	

[x] Other (specify) DEMOTION

5. NARRATIVE

PROGRAMMING: Inmate Gotcher arrived at CRCC on 8/31/92 and was transferred to WSP on 9/23/92, as a disciplinary problem.

SERIOUS INFRACTIONS: 9/16/92 103/701/506 A female staff member was notarizing and copying some documents for inmate Gotcher. He intimidated her by brushing up against the side of her body, touching her arm and hand. He was told to step back and complied, however he again brushed up against her right side and proceeded to make inappropriate comments concerning female staff members. Sanction: 20 days Segregation and 30 days Loss of Good Time.

9/21/92 506 Inmate Gotcher wrote a letter which referred to a female staff member. As recorded in the infraction report, the letter contained these statements: "I will make her pay in the end if it takes me twenty years." and also "I will use all my sources to find out about her." The female staff member felt threatened by these statements. Gotcher was found guilty and his appeal was denied. Sanction: 10 days Isolation and Suspend 10 days Isolation for 180 days.

COUNSELOR COMMENTS: Gotcher was demoted to medium custody on 10/12/92 when his CRS dropped to 52. The most recent infraction has caused his infraction behavior score to equal 0. According to the policy he should be demoted to close custody.

COUNSELOR RECOMMENDS:

1. Demote to close custody, infraction behavior score 0, ERD 5/14/93.
2. House at Main Institution.
3. Remain infraction free and participate in program.

AW/mf
REASON PAST MFED 111 REASON PAST WTR DATE 112 REASON PAST REL. DATE 000
UNIT TEAM COMMENTS/RECOMMENDATIONS/ ACTIONS:
1) Demote to close custody, infraction behavior score - 0, ERD 5/14/95
2) House at M.I.
3) Remain infraction free and participate in program.
Inmate comments: Gotcher said he would rather remain at MSC to finish his time and engage in a program. He would appeal.

UNIT TEAM CHAIRPERSON /s/Alan Walter DATE: 10-28-92

Committee Members: Walter, Alves, Vannatter
REVIEW COMMITTEE/RECOMMENDATIONS/ACTIONS:

Demote to Close Return to Main inst.

REVIEW COMMITTEE CHAIRPERSON: /s/ Van Skike DATE: 10/30/92

Committee Members: /s/ Lt. Lawson /s/ R. Alt

concur - close

[FOR] SUPERINTENDENT: /s/ Wayne Helgeson
Date 10/30/92

---

6. NUMBER: 634076

NAME: Last first middle
GOTCHER NORMAN

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

28 U.S.C. § 2254(b) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of a prisoner."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX L

POLICY

DEPARTMENT OF CORRECTIONS	POLICY NUMBER 350.100
TITLE EARNED RELEASE TIME	Page 1 of 3

EFFECTIVE DATE: August 15, 1990

AUTHORITY:

General authority of the Secretary of Corrections to manage and direct the Department. RCW 72.09.050. and Chapter 9.94A RCW.

PURPOSE:

To establish a system of incentives to be awarded to offenders as a means of assisting in the management of Department of Corrections facilities. As a means to earn sentence reduction credits from their minimum term, it is the Department's expectation that all offenders will be involved in acceptable behavior and actively programming. In no case shall the aggregate of earned good conduct time and earned time exceed the limits identified under #3, Earned Release Time, in the Definition Section in this policy.

APPLICABILITY:

The Divisions of Community Corrections, Prisons, and Offender Programs.

. . .

APPENDIX M

REVISED CODE OF WASHINGTON

9.94A.150 Leaving correctional facility or release before expiration of sentence prohibited--Exceptions. No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

(1) Except as otherwise provided for in subsection (2) of this section, the term of the sentence of an offender committed to a correctional facility operated by the department, may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned early release credits in advance of the offender actually earning the credits. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to

the department of corrections, the county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned early release time. In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case shall the aggregate earned early release time exceed one-third of the total sentence; . . .

APPENDIX N

REVISED CODE OF WASHINGTON

72.09.130 Incentive system for good conduct--Dissemination. The department shall adopt a system providing incentives for good conduct and disincentives for poor conduct. The system may include increases or decreases in the degree of liberty granted the inmate within the programs operated by the department and recommended increases or decreases in the number of earned early release days that an inmate can earn for good conduct and good performance. Earned early release days shall be recommended by the department as a form of tangible reward for accomplishment. The system shall be fair, measurable, and understandable to offenders, staff, and the public. At least once in each twelve-month period, the department shall inform the offender in writing as to his or her conduct and performance. This written evaluation shall include reasons for awarding or not awarding recommended earned early release days for good conduct and good performance. The term "good performance" as used in this section means successfully performing a work, work training, or educational task to levels of expectation as specified in writing by the department. The

term "good conduct" as used in this section refers to compliance with department rules.

Within one year after July 1, 1981, the department shall adopt, and provide a written description of, the system. The department shall provide a copy of this description to each offender in its custody.

Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

(2)

NO. 95-1385

**IN THE
SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1995

TANA WOOD, ALAN WALTER, GARY EDWARDS, JULIUS VAN SKIKE, WAYNE HELGESON, TERRENCE LAWSON, RICH ALT,

Petitioners,

v.

NORMAN GOTCHER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN B. MIDGLEY
Counsel of Record for Respondent

COLUMBIA LEGAL SERVICES
625 Commerce Street, Suite 430
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(206) 572-4343

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The respondent, Norman Gotcher, Jr. respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's decision in this case. That opinion is reported at 66 F.3d 1097 (1995).

STATEMENT OF THE CASE

A. The Washington Disciplinary System And Good Conduct Time

The Petition does not directly acknowledge a crucial characteristic of the Washington State prison "good time" regulations reviewed by the Ninth Circuit: Under those regulations Washington prisoners who are not found guilty of serious misconduct at a prison disciplinary hearing are entitled to "good conduct time" sentence reductions. The Ninth Circuit, in a passage that the State does not contest here, accurately described the Washington good conduct time system:

> Pursuant to Washington's Sentencing Reform Act (SRA), inmates can earn an early release date through an earned early release program comprised of "earned time," *see* WAC [Washington Administrative Code] § 137-28-006(5), and "good conduct time credits," *see* WAC § 137-28-006(6). "Good conduct time credits," which are at issue here, are defined as that portion of an inmate's potential sentence reduction gained by not receiving a "serious infraction." WAC § 137-28-006(6); *see also* DOC Policy No. 350.130 (defining "Good Conduct Time" as "[t]hat portion of time which an offender is eligible to earn by behaving pro-socially, i.e. not receiving serious infractions"). Thus, inmates who do not commit serious infractions are entitled to good conduct time credits, which can constitute 10 days credit for every 30 days served. *See* DOC Policy No. 350.130.
>
> These provisions were developed in response to Revised Code of Washington (RCW) § 72.09.130, which provides that the DOC "shall adopt" a system providing incentives for good conduct. Pursuant to RCW § 72.09.130, the good conduct time credit program "shall be fair, measurable, and understandable to offenders, staff, and the public."

Gotcher v. Wood, 66 F. 3d 1097, 1099 (9th Cir. 1995)(emphasis added). [1]

The petitioners' statement that a Washington prison superintendent is unilaterally "free to define additional types of misconduct, beyond serious and general, sanctionable with loss of good time credits..." (Petition at 4 - 5) is simply incorrect. The Washington Administrative Code rule the State cites makes this clear, as it states only that the superintendent may, upon written approval of the Department of Corrections central office, create new general or serious infractions, reclassify infractions from serious to general, or create new sanctions.[2] This does not change the overriding rule that good conduct time credits will be granted in the absence of

---

[1]The Petition asserts that good conduct time could be denied on the last day before release, but prefaces this with "[I]f the disciplinary code has been violated." Petition at 4. However, it is not any disciplinary violation that can lead to a failure to gain good conduct time, but only a violation of the portion of the code defining "serious" misconduct that can have this consequence. And of course, this means that if there has not been a finding of guilt of a serious infraction, good conduct time must be granted. Thus, the State's assertion that "Prisoners who may have accrued good-time credits may not rely on those credits for an early release" (Petition at 4) is only true if the prisoner has been found guilty of a serious infraction. If he or she has not, he or she can rely on getting the good conduct time credits.

The Petition at 4 also speculates about what the Washington Department of Corrections might do to amend its rules regarding discipline. But of course the court below decided this case based on the administrative rules in effect when the case was decided. Those rules reserved potential loss of good conduct time to proof of serious misconduct - - as defined by Washington officials -- at a disciplinary hearing.

[2] The rule states in full:

> WAC 137-28-010 Supplementary rules. The superintendent of an adult correctional institution may promulgate local supplementary rules, policies, and procedures including the creation of new general and/or serious infractions, the reclassification of general and/or serious infractions set out in these rules, and the creation of new sanctions. All such new or reclassified infractions and sanctions shall be approved in writing by the director before being put into effect.

conviction of serious misconduct. The superintendent has no power to decide that an infraction designated as other than serious will carry loss of good conduct time credits, and there was no rule or policy involved in this case in which any prison or corrections official purported to affect good conduct time except as a penalty for serious infractions.

B. The Complaint

The lower courts correctly understood Mr. Gotcher's claim under 42 U.S.C. § 1983 to explicitly include - - as acknowledged below by the State - - an attack on the constitutional adequacy of the procedures used at the prison disciplinary hearing.[3]

---

[3] "He alleges that, with regard to the disciplinary hearings on these infractions, Washington Department of Correction [sic] (DOC) employees, among other things, failed to give him 24-hour advanced written notice of allegations against him and did not allow him to call witnesses or present documentary evidence in his defense." Gotcher v. Wood, 66 F.3d at 1098. See also, the district court's opinion, appendix C to the Petition, at C-2 to C-3 ("He also complains he was not afforded adequate notice of the infraction hearings, and was denied the opportunity to call witnesses on his behalf.")

The document called Second Amended Complaint With A Jury Demand, Appendix G to the Petition, should be read with another document Mr. Gotcher filed in the district court on the same day as he filed the Second Amended Complaint. This document, which is called "Memorandum Of Support To Second Amended Complaint" actually contains most of Mr. Gotcher's specific factual allegations. In the Court of Appeals, we relied on this document (without objection) as demonstrating, along with the Second Amended Complaint, the nature of the claims. The Memorandum of Support To Second Amended Complaint is reproduced as Appendix A to this Brief in Opposition, and it demonstrates at pp. A-3, A-5, A-7, A-8, A-9, A-11, and A-17 that Mr. Gotcher was explicitly attacking the procedures used at the disciplinary hearing.

Notably, the State agreed. See the State's Brief Of Defendants - Appellees in the Ninth Circuit at 2 - 3, which said, inter alia:

> Gotcher also alleged he did not receive 24 hours' notice prior to one of his prison disciplinary hearings. He also claimed that Lt. Edwards found him guilty at his infraction hearing based only on the written infraction report, without considering documentation presented by Mr. Gotcher, and without any of his requested witnesses being present. He maintained that Lt. Edwards did not indicate on the record at his hearing why his witnesses were not called.

C. Course of Proceedings

The pro se Second Amended Complaint was dismissed on a motion for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

The Ninth Circuit made three holdings, only two of which are challenged in this Court. The Ninth Circuit: held, consistently with language in this Court's decisions, that Mr. Gotcher's due process challenge to disciplinary procedures was proper in a § 1983 lawsuit; held that Washington's system of entitlement to good conduct sentence reductions absent proof of serious misconduct created, under this Court's decisions, a liberty interest; and held that Mr. Gotcher's claim that disciplinary segregation was sufficiently onerous to create a liberty interest had to be remanded for factual development. Gotcher, 66 F.3d at 1099-1101. The Petition does not challenge the third holding.

D. Mr. Gotcher's Release From Prison

Mr. Gotcher was released from prison in 1995, while this case was pending in the Court of Appeals. His release does not render his claim for damages in the § 1983 case moot, but it does mean that he could not receive any relief in this case which would shorten his prison sentence, either directly or by application of so-called "collateral estoppel" or related doctrines.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE DOES NOT PRESENT ANY IMPORTANT ISSUE REGARDING THE RELATIONSHIP BETWEEN HABEAS CORPUS AND CLAIMS UNDER 42 U.S.C. § 1983.

The Petition first purports to raise a federal jurisdictional issue regarding the relationship between habeas corpus cases and cases filed under 42 U.S.C. § 1983. However, for the reasons given below, no important issue of this sort is presented in this case.

A. Because Mr. Gotcher Has Been Released From Confinement, No Issue Of Earlier Release Effected Through A § 1983 Lawsuit Is Presented.

Mr. Gotcher is no longer in prison. His prison term cannot be shortened no matter what the outcome of his § 1983 case. Consequently, this case presents no potential of a prisoner effectively shortening a prison term through a § 1983 suit, and therefore raises no important jurisdictional issue for this Court to decide.

B. This Court Has Again Recently Explained Why, Given That Mr. Gotcher's § 1983 Complaint Challenged The Disciplinary Procedures Used By Prison Authorities, The Ninth Circuit Was Correct In Holding That The Case Should Not Be Treated As Habeas Corpus; There Is No Meaningful Circuit Split On This Point.

The Petition is wrong to suggest that there is any need for this Court to decide whether a prisoner can bring a § 1983 claim challenging prison disciplinary procedures when one of the sanctions was a loss of good time. On the contrary, this Court very recently discussed -- for the second time -- why a prisoner can bring such a claim under § 1983.

In Heck v. Humphrey, 512 U.S. ___, 114 S. Ct. 2364 (1994), this Court found, just as the Court had found in Wolff v. McDonnell, 418 U.S. 539 (1974), that a § 1983 challenge to prison disciplinary procedures does not convert the case into habeas corpus even though loss of good time was a disciplinary sanction, because there is no necessary effect on the length of a prison term:

> ...[W]e think [Wolff] recognized a § 1983 claim for using the wrong procedures, not for reaching the wrong result (i.e., denying good-time credits). Nor is there any indication in the opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits. Thus, the claim at issue in Wolff did not call into question the lawfulness of the plaintiff's continuing confinement.

114 S. Ct. at 2370 (citations omitted; first emphasis added, second by the Court).

Thus the Court in both Wolff and Heck made clear that insofar as a § 1983 case seeks damages for constitutionally inadequate procedures that led to the loss of good time, it is not a habeas case and there is no conflict with Preiser v. Rodriguez, 411 U.S. 475 (1973). Indeed, Wolff stated that even if the § 1983 complaint contained both a habeas-style claim for restoration of good time credits and a request for damages for unconstitutional procedures, the challenge to procedures and request for damages could go forward under § 1983. 418 U.S. at 554 - 555.

Because Mr. Gotcher explicitly claimed that the prison disciplinary procedures were unconstitutional and requested damages, this case hardly presents any novel or important problem after Heck. This is especially true because Mr. Gotcher has been released and cannot regain his good conduct time no matter what the outcome of the present § 1983 case. This case involves no tension between Preiser and Wolff as the state claims, and thus there is no reason for this Court to review this alleged issue.

Notably, Heck clarified the meaning of Wolff very recently and the Petition shows no split of federal circuit authority on it since Heck was decided. The Petition cites only two post-Heck Circuit decisions in an attempt to show a split. In one, the majority follows Heck's discussion regarding Wolff, while the dissent claims that despite what the Court said about Wolff in Heck, that dictum was inconsistent with the result in Heck. Armento-Bey v. Harper, 68 F.3d 215, 216 (8th Cir. 1995). The other deals not with a Wolff-type attack on disciplinary procedures but with a § 1983 challenge to the loss of a prison drug program, participation in which entitled a prisoner to certain good time credits. Best v. Kelly, 39 F.3d 328 (D.C. Cir. 1994). The court simply held, consistently with Wolff and Heck, that "the portion of the

complaint in which plaintiffs contested the loss of good time credits they would have received..." sounded in habeas corpus and must be dismissed. Id. at 330. These cases show no post-Heck split on the viability of Mr. Gotcher's due process challenge to disciplinary procedures.

Given the recent reiteration in Heck of the viability of Wolff-type claims under § 1983, any alleged pre-Heck circuit split would not be important now. In any event, the State's claim that there was a serious split before Heck is exaggerated. The State cites only three pre-Heck cases which it can muster on its side of the claimed split, see Petition at 15 - 17. One, Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986) is not relevant, as it involved a direct attack on imprisonment for civil contempt. Another, Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) has not survived Heck in its own circuit: Offet asserts that there is no distinction between attacking length of sentence directly and attacking procedures, but as Heck showed, and as the Eighth Circuit itself recognized after Heck in Armento-Bey v. Harper (discussed above), this was an incorrect reading of Wolff and Preiser. The third, Serio v. Members of Louisiana State Board Of Pardons, 821 F.2d 1112 (5th Cir. 1987) involved parole board procedures and not prison disciplinary hearings, but does contain dicta that could require exhaustion of state remedies even when attacking prison disciplinary practices. Id. at 1118.

Thus there survives at most pre-Heck dicta in one circuit case cited by the State that runs contrary to the meaning of Wolff that has since been made clear in Heck. This hardly demonstrates a significant or meaningful split of circuit authority.

There is no reason, let alone a compelling one, for this Court to grant certiorari on the first issue posed in the Petition.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO PARSE THE STATE OF WASHINGTON'S DESIGNATION OF WHAT IS SERIOUS PRISONER MISCONDUCT.

The State tries in the Petition to suggest that there is also an important due process question in this case after Sandin v. Conner, ___ U.S. ___, 115 S.Ct. 2293 (1995). However, there is no such issue presented because the opinion below is fully consistent with the letter of Sandin.

A. The State Ignores The Portion of **Sandin v. Conner** Relevant To This Case.

The Ninth Circuit in this case made a simple, straightforward, correct ruling: Washington prison regulations hold that good conduct time sentence reductions will be granted unless a prisoner is found guilty of serious misconduct at a prison disciplinary hearing; the Nebraska good time system this Court found to implicate federal due process protections in Wolff v. McDonnell likewise limited loss of good time to proof that a prisoner was guilty of serious misconduct; this holding of Wolff is still good law as explicitly stated in Sandin [4]; therefore federal due process protections are implicated by the Washington system. Gotcher v. Wood, 66 F.3d at 1100 - 1101.

The State does not deny that the Washington system works exactly as described by the Ninth Circuit. Given that it does work this way, the Ninth Circuit's decision was compelled under Sandin's discussion of Wolff.

Moreover, the Ninth Circuit decision does not have broad implications. The Court in

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[4] See, e.g., Sandin, 115 S.Ct. at 2297 (describing the Nebraska good time system analyzed in Wolff as creating a very substantial liberty interest because it allowed loss of good time "only if the prisoner was guilty of serious misconduct..."), 2300 ("The time has come to return to the due process principles we believe were correctly established and applied in Wolff and Meachum [v. Fano, 427 U.S. 215 (1976)].").

Sandin did not make clear every incident of prison life that would be sufficiently serious to invoke the protections of the Due Process Clause, but the Court made quite clear that the kind of good time system Washington has does still rise to the level needed to invoke the Constitution. Other kinds of state good time systems might or might not invoke the Due Process Clause, but any system that is so much like Wolff as Washington's clearly invokes constitutional procedural protections after Sandin. The Ninth Circuit merely recognized this, and so this case presents no important issue for this Court to decide.

The State ignores this obvious meaning of Sandin and instead asks this Court to read Sandin to mean that if Washington prison officials' designation of serious prisoner misconduct is different from Nebraska's designation of serious prisoner misconduct, this requires a different due process result in Washington than in Nebraska. See Petition at 22 - 23. In other words, the State wants this Court to compare in detail the Nebraska and Washington designations of serious misconduct and devise a distinction between them that would mean that federal due process protections apply to Nebraska's system that reserves loss of good time to proof of serious misconduct but not to Washington's system that reserves loss of good conduct time to proof of serious misconduct.

Thus, far from eschewing federal court interference with state discretion, the State is soliciting an essentially fact-bound inquiry into the states' own judgments about what constitutes serious prisoner misconduct. The Ninth Circuit's decision does not interfere with how the states choose to define serious misconduct or set up their good time systems. This Court sits neither to determine such questions nor to save the states from their own decisions about what is serious enough to require loss of good time. There is thus no arguable basis for certiorari on the second

question posed in the Petition.

B. The Court Of Appeals Reversed A 12(b)(6) Dismissal And Remanded For Further Proceedings, Leaving The Case In A Preliminary Posture.

The Court of Appeals was careful to point out that it was reviewing the dismissal of a pro se complaint under Fed.Rule of Civ. Proc. 12(b)(6). Gotcher, 66 F.3d at 1098-1099. There has been no determination whether state officials did or did not follow proper procedures at the disciplinary hearing. In addition, in a ruling on which the State does not seek review here, the Court of Appeals held that the record was not complete enough to determine, in light of Sandin, whether the disciplinary segregation Mr. Gotcher also received as a sanction was a significant enough deprivation to trigger federal due process protections. Id. at 1101. Thus the case is in a preliminary posture, and the State's attempts to seek review are premature.

C. The Regulations Construed By The Ninth Circuit To Find A Liberty Interest Have Been Superseded.

The prison disciplinary regulations currently in effect in Washington are different from those that were in effect at the time of Mr. Gotcher's disciplinary hearings. The differences are set forth in the margin.[5] The Ninth Circuit, of course, decided the case under the regulations

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[5] With respect to the regulations specifically referred to in the Ninth Circuit opinion, the following changes have been made:

a. Former WAC § 137-28-006 (6) provided as follows:

> "Good-conduct time credits" means that portion of an inmate's potential reduction to his/her minimum term which is authorized by RCW 9.95.070 and 72.09.130 and which is gained by not receiving serious infractions as listed in WAC 137-28-030.

This section has been repealed and replaced by WAC 137-28-160, which provides in pertinent part:

> Good conduct time credits - that portion of an inmate's

in effect at the time of the hearings. Although we do not concede that the changes in the regulations would change the result in a new case under the new regulations, the recent changes would limit the value of any decision by this Court under the old regulations.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted this 29th day of March, 1996.

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potential reduction to minimum term which is authorized by RCW 9.95.070 and 72.09.130 and which may be lost by receiving serious infractions.

b. Former WAC 137-28-005(1) provided:

> The rules in this chapter shall provide a standardized system consistent with constitutional due process for ascertaining whether misconduct by an inmate of an adult correctional institution has occurred.

This section has been repealed and replaced with WAC 137-28-140, which provides:

> The rules in this chapter provide a standardized system to determine whether misconduct by an inmate of an adult correctional institution has occurred.
>
> The rules in this chapter shall not apply to proceedings of the indeterminate sentence review board or the division of community corrections.
>
> The following rules set forth procedural guidelines. They do not create any procedural or substantive rights in any person, including any liberty interests in time credits, levels of custody, classification status, or other privileges. In accordance with Washington statutes, such matters are governed solely by the discretion of the department of corrections.

APPENDIX A

[FILED]
[August 24, 1993]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NORMAN GOTCHER JR., Plaintiff, V. TANA WOOD, WAYNE HELGESON ALAN WALTER, JULIUS VAN SKIKE, Lt. G. EDWARDS, RICK ALT, Lt. LAWSON Defendants.	NO. CS-93-0120-FVS MEMORANDUM OF SUPPORT TO SECOND AMENDED COMPLAINT

CIVIL RIGHTS COMPLAINT
WITH A JURY DEMAND

This is a Civil Rights Action under 42 U.S. § 1983 Filed by NORMAN GOTCHER JR., A State Prisoner, alleging Violation of His Constitutional Rights and Seeking Money - Damages, Declaratory Judgment, and Injunctive Relief. Plaintiff - Requests a Trial by Jury.

JURISDICTION

1. This is a Civil Rights Action, Under 42 U.S.C. § 1983. This Court has Jurisdict under 28 U.S.C. 1331 § and 1343. Plaintiff also invokes the Pentent Jurisdiction of this Court.

VENUE

2. Venue is proper in this Court Pursuant to 28 U.S.C. 1391 (b). The Claims Set Fo in this Complaint Occurred in Connell Wash,

at Coyote Ridge Camp, And also at Walla Walla State Penitentiary, In Walla Walla: Wash. Eastern District.

PARTIES

(a). Plaintiff, NORMAN GOTCHER JR., Is presently incarcerated at Washington State Penitentiary, Walla Walla (W.S.P.).

(b). Defendant - TANA WOOD - Superintendent of Walla Walla State Penitentiary (W.S.P.)

(c). Defendant - WAYNE HELGESON - Associate Superintendent of Walla Walla State Penitentiary (W.S.P.)

(d). Defendant - ALAN WALTER - M.S.C. Baker Unit Counselor of Walla Walla State Penitentiary (W.S.P.)

(e). Defendant - RICK ALT - Of M.S.C. Building as a Committee Classification Member of Walla Walla State Penitentiary (W.S.P.)

(f). Defendant - JULIUS VAN SKIKE - M.S.C. CCIII Review Committee Chairperson for Classification Hearings of Walla Walla State Penitentiary (W.S.P.)

(g). Defendant - Lt. G. EDWARDS - Of M.S.C. Building as a Major Hearings Officer.

(h). Defendant - Lt. LAWSON - Of M.S.C. Building as a Committee Classification Member of Walla Walla State Penitentiary (W.S.P.)

The Name's From B-H Caused and Personally Participated in Causing the alleged deprivation of Plaintiff's Constitutional Right's.

Each party is Guilty of Violating Plaintiff's Equal Protection which Guarantee's Plaintiff's Due Process Rights to the Fifth Amendment of the United States Constitution's, State And Federal.

FACT'S

"STATE AND FEDERAL CASES, AND DOC WAC RULE'S AND POLICIE'S" SUPPORTING MY CLAIMS UNDER NO. CS-93-0120-FVS.

All partie's under No. CS-93-0120-FVS caused the deprivation of plaintiff's Constitutional Rights.

(A). On 10-13-92 Alan Walter, Confronted Plaintiff to making an override to the 506, Setting the Classification Hearing for 10-14-92 without any allegation's or document's to the charge against plaintiff to be true.

(B). On 10-13-92 Lt. G. Edward's Hearing Lt. Held plaintiff Major Hearing the same day without any 24 hr Advance Notice, Statement's, Docment's, Witnesse's and Defendant's, Requested by Plaintiff before the Hearing took place.

(C). On 10-14-92 Alan Walter, Rick Alt, Julius Van Skike, And Lt. Lawson, Made their Judgment to close my Custody, Take all my point's, and ship plaintiff away from M.S.C. Building without making their strick decision apart of Administrative Record's, And Deprived plaintiff of a Fair and Factual Classification Hearing by the DOC WAC's 137-28-085, And 137-28-075 Rule's.

(D). On 10-15-92 Plaintiff Appealed to Tana Wood; She responded, Heard Plaintiff Appeal, Then made Her own Judgment to Deny Plaintiff Appeal from the Rule's She Set Forth in DOC's Policie's, and WAC Rule's 304.00, 304.10, and 305.40, and WAC 137-28-075, 137-28-085.

(E). Assoc, Supt. Wayne Helgeson - Also on 10-15-92 Denied

Plaintiff Appeal, and took part to the Classification by dening plaintiff the Due Process and Equal Protection Clause

(F). On 12-18-92 Plaintiff Seened Supt. Tana Wood in 8wing around 11:36 am asking Her About a Clarification through his Paralegal Richard Heath Rideout And to Afford Him the proper treatment of justice as so other's with Evidence and Fact's.

(G). Tana Wood's Disregarded this, and sent plaintiff Her Memorandum He Received on 1-6-93 Stating the infraction happened at Another Institution for you to Deal with that Superintndent from that institution.

(H). Yet Plaintiff was told by Alan Walter and His Committe Member's, Julies Van Skike, Lt. Lawson, and Rick Alt to Appeal His Sanction's to Tana Wood which He did, and She Hear His Appeal to make Her Decision; Because on 11-6-92 She Stated we have Reviewed your Appe and Recent Classification Action which Demoted you to Closed Custody,And this Demotion - Will Stand.

(SPECIFIC CONDUCT WAS UNCONSTITUTIONAL).

TANA WOOD - Violated Plaintiff Due Process and Equal Protection Right's by her Fals Statement's and Action's, Denied Plaintiff the DOC. WAC 137-28-075, 137-28-085, The WAC's 304.00, 304.10 and Not upholding the WAC 305.40 to Decision Making Authority of Classifiction Committee and Policie's.

She Violated Her policie's and WAC Rule's by making the Sanctions, But then afterwards inforcing Plaintiff Appeal to Another Facility that punished me twice for one Crime - Charged,

And took away Plaintiff Right's and Privledge's Etc.

Lt. G. EDWARDS - Violated Plaintiff Constitutional Right's, By denying Plaintiff, Due Process and Equal Protection under Wolff v. McDonnell 41 L.Ed.2d 935 Must Meet one of Four. And also Taylor v. Illinois Cite as 108 S.Ct. 646 (1988). By; (a). Not Advancing Plaintiff with a 24 hr Notice of Hearing. (b). Dening Plaintiff the right to call upon

CONTINUED.

Defendant's and Witnesse's (c) Dening Plaintiff the Right to Marshall the Fact's, Statement's, Allegation's, And Documents So He could prepare for His own Defense. (d). Plaintiff was Never read His Miranda Right's before going to the Hearing Once Alan Walter told Plaintiff He had a 506 write up. (e) Lt. G. Edward's told Plaintiff once starting his Hearing that He have the Right to Remain Silent that can be used against Him at the Hearing, Then made Judgment to find Plaintiff Guilty.

ALAN WALTER, JULIES VAN SKIKE, RICK ALT, Lt. LAWSON - All Violated Plaintiff Due Process and Equal Protection. (a) . Plaintiff was Denied to present relevant, Non-Cumunlative Documentary Evidence in His own Defense. (b). Neither one of the Defendant's Acted in Good Faith to insure Plaintiff was Afforded His Equal Protection Right's, By Dening Plaintiff all His Afforded Right's under the Fourteenth Amendment to the United State's Constitution. Under Wolff v McDonnell 41 L.Ed. 2d 935 Must meet One of Four, And under the WAC 137-28-085, and 137-28 075. 304.00

304.10 305.40 Rule's.

ASSOC. SUPT: WAYNE HELGESON - Violated Plaintiff Due Process and Equal Protection Right's; (a). Deprived Plaintiff the Rights of Legitmate paper work to prove His Innocense, and Denied Him the rights to gather or Marshall any Fact's, Documents, or to call upon Witnesse's to prove His Innocense, And Never stood by the DOC WAC 137-28-085/137-28-075 or the Wolf v. McDonnell case to meet one of four Standards.

TANA WOOD, WAYNE HELGESON
ALAN WALTER, Lt. G. EDWARDS
Lt. LAWSON, RICK ALT, And
JULIUS VAN SKIKE.

Has all Violated Plaintiff Due Process and Equal Protection Guaranteed by the United State's Constitution's.

TANA WOOD, And WAYNE HELGESON - Has Acted as a Quasi - Judicial Power and Has Acted as a Judicial Body, Affording their own right's to Deprive Plaintiff of Right's from one Jurisdiction to their's punishing Plaintiff to one crime charged from a diffrent Institution of a diffrent Jurisdiction, to the Dubble Jeopardy Clause that Plaintiff also feels that this is also Conspiracy that denied Him Afforded Right's from Wolff v. McDonnell 1 - 4 DOC WAC 137-28-075, 137-28-085 Etc.304.00, 304.10, 305.40 Rule's.

TANA WOOD, And WAYNE HELGESON - Has the knowledge to the Disciplinary Court Action in a Quasi Judicial Function as Stated in Black's Law Dictionary page 1245. A term Applid to the Action's, Discretion Etc. of Public Administrative Officer's or Bodie's, Who are Required to Investigate Fact's, or Ascertain the Existence of

Fact's, Hold Hearings, -- Weigh Evidence, and Draw Conclusion's from them as a Basis for their Official Action, and to Exercise Discrection of a Judicial Nature. These all were Violated by TANA WOOD, and WAYNE HELGESON; And Plaintiff was tried and Convicted by two Jurisdiction's Depriving Plaintiff to any Fair Impartial Hearing. These Cause's have not been Applied Equally or Fairly from One Institution to Another, therefore Plaintiff was Discriminated against and all Proceedure's has been Violated.

Under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

Lt. G. EDWARDS - On 10-13-92 Told Plaintiff at the Hearing, that He had a right to Remain Silent to a possible prosecution, And that anything Plaintiff said can be used against Him. Under; 384 U.S. at 469-470.86 S.Ct. at 1625 Mathis, Supra, Applied Miranda's Reasoning to those Already in prison. It Follow's therefore, that the Miranda Soluction must be Foremost in the Mind's of prison Administrator's, They must make it quite clear to an inmate who is under threat of Criminal prosecution, that while He has a Due Process Right to speak, He is under No Compulsion to do so. If the Inmate Chooses to remain silent, He must Not be questioned Further, which also Violated Plaintiff Fifth Amendment Right's.

Again by Lt. G. Edwards there were No Explanation of a denial to Plaintiff Constitutional Right to present witnesses to be present at the time of His Disciplinary Hearing, that in No way would had or wasent Stated that it would be unduly Hazardous to

institutional Saftey or Correctional Goals Under Taylor v. Illinois Cite as 108 S.Ct.646(1988) Nor did the Record Reflect why in specifics as part of the Administrative Record for the Disciplinary Proceeding, Id., at 556,41 L.Ed 2d 935, 94 S Ct 2963, 71 Ohio ops 2d 336.

To back the Statements above, the Disciplinary Board must State it's Reasons for Refusing to call Witnesses, Whether it be for irrelevance, Lack of Necessity, or the Hazards presented in Individual Cases under 418 US, at 566, 41 L.Ed 2d 935, 94 S Ct 2963, 71 Ohio ops 2d 336.

These were unconstitutional to the Extent that they didnot require the Administrative Record to Contain reason's Supporting the Board's Denial of Plaintiff Witnesse's Requested Under Real v. Superintendent, Massachusetts Correctional institution, Walpole, 390 Mass 399, 456 NE2d 111 (1983), We granted certiorari, 469 US 814, 83 L Ed 2d 26, 105 S Ct 77 (1984)

CONTINUED.

Had they Allowed Plaintiff Witnesse's in His behalf, And to Cross Examine the Witnesses and Defendant's to find out any Racial Biasness to writting Plaintiff up or period, that Plaintiff Now Contend's the Hearing Lt. and Classification Board was within Bad Faith, And Failed to Follow the DOC, WAC Rule's - 137-28-085, 137-28-075 And the WAC 137-28-065 (2) (4).

Lt. G. Edwards Violated WAC 137-28-085 (1)(2)(a)(b)(c)(d)(f), 3,4,5,6, And Wolff v. McDonnell 1-4.

ALAN WALTER, RICK ALT
JULIUS VAN SKIKE, And
Lt. LAWSON, Committee Member's:

On 1-14-92 Has Caused a Municipal Liability under Section 1983 to Deprive Plaintiff of Right's Secured by the U.S. Constitution's, And Federal Statute's. ANd the Hearing's Conducted Deprived Plaintiff Equal Protection of the Law's, By:

(a). Not giving plaintiff the opportunity to have Access to Non-Confidential Report's and Records an Reports by the Hearing Officer during the Fact Finding Stage or before.

(b). The Board Stated reason's for this Denial were Defective, And the Decision's Departed from Board Rule's and Regulation's, and Customary Affordable for Hearing and Clalssificatio "Policie's, therefore personally singling plaintiff out for Harsher treatment and Punishment than that Accorded to Similar Situated prisoner's.

(c) The Statute of the Classification by all Member's above was inherently invidious, And did impinges on plaintiff Fundamental Rights, and on the Erea's in which the Judiciary had a Duty and Obligation within their own Jurisdiction to uphold their own policie's and Rules Not to Another Jurisdiction Depriving Plaintiff of all Afforded Equal Protection which Guarantee's plaintiff the Due Process Right's to the Fifth Amendment.

WHY?

Because Never once while plaintiff was at Coyote Ridge Camp and written up for the 506, Was He given 24 hr Advance Notice to the 506 write up, Nor was Plaintiff Advance 24 hr Waiver Notice for

Witnesses by Lt. Terry Waldher, Nor was Plaintiff Advanced any type of papers to the Charges, and Allegations against Him; the same with the Haring Officer Lt. G. Edwards at W.S.P. M.S.C. Building.

The Staff's at M.S.C. And both Supt; Tana Wood, and Assoc. Supt; Wayne Helgeson and the Major Hearing Lt. G. Edwards was outside of a Judicarary process for Holding plaintiff Hearing that came from Another Institution from Another Jurisdiction. Each party have Denied plaintiff the right of Witnesses to be present. They all Denied plaintiff the right to Confront the Defendant's who wrote the Intial write up, And Never gave plaintiff Achance to Gather Fact's for His Defense, Nor to Marshall all the Statement's, Document's, and Evidence against Him; Until He was brought to the Major Hearing at the W.S.P. M.S.C. Building. Still Never was it Stated why plaintiff couldnot Confront the Defendant's, and No specific reasoning made part of the Administrative Record for the specific Denial of Witnesses to His Defense, that in No - Way Jeopardized Institutional Safety or Correctional Goal's.

Refraiming back to page five, paragraph two; The Classification Committee Member's Never Afforded plaintiff any Right's or Priveldges as would had been to a Normal Classification Hearing, And had based their perception's on plaintiff Race and National Orgion that Isolated plaintiff from the Equal Protection by a Scheme or plan to rush plaintiff away from the Building without making any parts of the Administrative Record apart of a Institutional Security Risk, or to the Ordially Operation of the

Institution or Hazard that has Not been Stated on the Record to this Effect, or Period.

Plaintiff Equal Protection Clause of the Fourteenth Amendment Arguing also: He was Discriminated against by the Classification Review Committee for the Dispropertionlly High Level of Caucasion's in Charge, Not Affording Plaintiff any type of Right's to Prove His Innocense, Nor Acted in Good Faith Checking the Right's Afforded to Him by the United States Constitution to the Fourteenth Amendment, and Fifth Amendment Due Process, And Equal Protection and their own DOC Policie's and WAC - Rule's, thereby the Motivation Act because of His Race, Color and Natural origion was looked upon by an all Caucasion -- Committee with Disregard's to the Policie's and Law's Afforded, that has Also injured - Plaintiff by the Challenged Action's of the Defendant's and Committee Member's, Towhich the injury is indeed fairly tracable to the Committee's and Defendant's Act's or Ommissions.

In ordinary Case's, A party has No standing's to Assert the Right's of third person's Because from the Classification held, there were No Citation to Supporting Authority - the Extrajudicial knowledge by one of First impression under: Alabama Law. The Statute itself doe's require that the three person's from whom the third panel Member's is to be choosen Are to be person's "qualified..... To Render a Fair and impartial decision". Ala.Code § 36-26-105 (emphasis added). However, the Statute Contains No such qualifying Language for the party Appointed panel Member's

Under Hardy v. Birmingham BD. Of Educ. Cite as 945 F.2d 1546 (11th Cir. 1992).

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1 Plaintiff cross Examination would had given Him an option also to find out any Racial Biasness to writting Him up, If He was Afforded a Right to have Defendant's and Witnesses present, And the Judgment by the Hearing Lt. and Classification Board that Was within Bad Faith, and Failed to Follow the DOC. WAC-Rule's. (970 F.2d 588 Federal Law.

IN CLOSING.,

Under: 303.70 Plaintiff State's the Fact that referral's will be Submitted on DOC - Form -530(x), Made to a unit team Classification Committee, or Classification and Parole Supervisor, who will Review Reccomendation's for Promotion or Demotion in Custody or Change in Status. Plaintiff Contend's that this proceedure was Not Followed by the Classification Board, as well as other proceedure's Violated from one Jurisdistion to Another.

Also Plaintiff Contends that Due Process Requires that a Defendant or Plaintiff be Permitted to Officer's Testimony of Witnesses in His Defense; id., Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

Plaintiff Also State's that the Sixth Amendment is Merely a Guarantee that the Accuse Shall have the Power to Subpeona Witnesse's. The Witnesse's would had been Supported and Material to Plaintiff Defense, If Allowed to be there at His Major Hearing.

Westen, the Compulsory Process Clause, 73 Mich,L.Rev.71,94-95 (1974) (Footnotes Omitted).

Plaintiff Contend's that for all Violation's Stated, Plaintiff ask the Court that He be Granted and Entitled to the Relief He seek's in His Original Complaint, and from His Second Amended Complaint which Follow's:

RELIEF

A. Refrain from interfering in Plaintiff's attempt's to prove His Innocense, and Regain His Freedom.

B. Refrain from retailiating against Plaintiff in any Manner including, but not limited to, Cell Searches, Strip Searches, Confiscation of Plaintiff's Legal Work, and other Property, Isolation, Administrative Segregation, Transfer to another Corrections Facility or Camp without Plaintiff Exercising His COntistutional Right to bring this Redress of

CONTINUED

Grievances to Trial.

C. Correct Defendant's Criminal Act's against Plaintiff by Having Supt: Tana Wood Refrain against any types of Retaliation from sending any of Her Officer's to Harrass Plaintiff in any type of way's by Her Action's. Also for Tana Wood to let the Court Know that my point's has been restored after holding me for one year in Her Custody, And that I receive my other 30 Day's back for which is still at a loss.

D. Correct Defendant's Criminal Act's against Plaintiff by having

Assoc; Supt: Wayne Helgeson Refrain against any type's of Retaliation from sending any of His Officer's to Harrass Plaintiff in any type of way's by His Action's.

E. Correct Defendant's Criminal Act's against Plaintiff by having Alan Walter Refrain against any more of His Violations of Plaintiff Constitutional Rights, And that He doe's Not Harrass plaintiff in any type of way's by the Plaintif being sent back out to the MSC Building awaiting His transfer to Indian Ridge Camp. Also for Alan Walter to look at all the Facts Next time, instead of using his haitred to find a person guilty. Plus to give a person a fair classification hearing, and let that person have enough time to prove His innocense.

F. Correct Defendant's Criminal Act's against Plaintiff by having Julius Van Skike, Rick Alt, Lt. Lawson, And Lt. G. Edwards, Refrain against any more Retaliation's by their Haitred and byPlaintiff Filing this Law Suit Against them from stripping Plaintiff Constitutional Right's and punishing plaintiff by the haitred for black's in general. Also for each of them to take this ugly mess off of my Record and out of my Central File's with their Oppoligies and Damages Rendered.

1. Plaintiff ask that each party provided for the Damages, Seperately.

RELIEF CONTINUE'S

Wherefore, plaintiff NORMAN GOTCHER JR., Request this Honorable Court Grant the Following Relief:

Issue a declaratory judgement that defendants Violated the EQUAL PROTECTION which -- Guarantee's Plaintiff's DUE PROCESS RIGHTS to the FIFTH AMENDMENT of the UNITED STATES - CONSTITUTION'S, STATE And FEDERAL. And Washington State Constitution, Article 1, § 3, 42 U.S.C. § 1997d, in Violation of State and Federal Law.

1). Defendant - Tana Wood - That She Violated these Constitutions, And that Plaintiff will except by the Courts from Her the Amount of One Hundreth Fifty Thousand Dollars Forth With.

2). Defendant - Wayne Helgeson - That He has also Violated these Constitutions, And that Plaintiff will except by the Courts from Him the Amount of One Hundreth Thousand Dollars Forth With.

3). Defendant - Alan Walter - That He Violated these Constitutions, And that Plaintiff will except by the Courts from Him the Amount of Two Hundreth, Seventy Five Thousand Dollars Forth With.

4). Defendant - Rick Alt - That He Violated these Constitutions, And that Plaintiff will except by the Courts from Him the Amount of One Hundreth Thousand Dollars Forth With.

5). Defendant - Lt. Lawson - That He Violated these Constitutions, And that Plaintiff "will" except by the Courts from Him the Amount of Seventy Five Thousand Dollars, Forth With.

6). Defendant - Lt. G. Edwards - That He Violated these Constitutions, And that Plaintiff will except by the Courts from Him the Amount of Seventy Five Thousand Dollars Forth With

7). Defandant - Julius Van Skike - That He also Violated these Constitutions, And that Plaintiff will except by the Courts from Him the Amount of One Hundreth Thousand Dollars Forth With.

CONCLUSION'S TO REQUESTING RELIEF.

Plaintiff: Further States why He should be Intiltled to Requesting for Relief, Compensatory Damages,Punitive Damages Etc.

Plaintiff Further Contend's that His Substantive Rights were Violated:

A). Because of being put through so many unecessary Violations to the Constitution by Coyote Ridge Staff Members, And W.S.P. And M.S.C. Staff Members as well.

B. Plaintiff Suffer alot of pain and Emotional Distress, and Humiliation, therefore Plaintiff suffer Mental and Emotional Distress because of all the punishments, and Deprivation of being stripped of all His points, Custody, and Now the lost of Good Time, Which has caused plaintiff to be on Relaxer Medication of 100% Milligram Centerquam to get to sleep at Night. Citing under 283 Mary and Crystal v. ramsden, 635 F.2d 590,600 (7th Cir 1980); Rhodes v. Robinson, 612 F.2d 766 (3d Cir. 1979); Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979).

Plaintiff was put into Segregation without adequate Notice and a Hearing; Plaintiff cannot Recover Damages for being in Segregation. And all W.S.P. And M.S.C. Staff Members and Officials had knowledge of the Activities to Plaintiff Hearing's. There were Failure by All the Mentioned parties to take Corrective Measure's

which Amounted to Deliberate Indeffrence, Violating Plaintiff my Eight Amendment Right to be Free from Cruel and Unusual Punishment. ANd the State Statute and Common Law were Violated when prison officials were Negligent in Providing Adquate Proceedure's of Law to Insuring Fair Major and Classification Hearing that didnot happen, Case citing 285 Carey v. Piphus, Supra Note 279; Seaton v. Sky Realty Co. 491 F.2d 634 (7th Cir. 1974); Powell v. Ward, 540 F. Supp. 515,517 (S.D.N.Y. 1982).

Plaintiff: NORMAN GOTCHER JR., Suffer Emotional Distress from the absence of proper proceedures, then found guilty of the Charges, then transferred to a Maximum Facility Inviroment were the air is bad, The cell ventilation is bad, the food is bad, there's over crowdingness, Exercises are limited, And plaintiff is on lock down 21 to 22 hr's a day, towhich plaintiff is limited to any type of activities period, plus plaintiff is in a very small cell amoung three other bodies which can cause serious amount of damages, and injury with the loss of more goodtime credits, the loss of more points, and custody, and of gett seriously hurt by the stress of His cell mates. Under the case of 286 Carey v. Piphus, id at 262-64

Also plaintiff contends that He is Suffering from being So-Far away from His Family in Seattle, and the fact He have to deal with these Staff's and Officer's up here who knows about everything plaintiff's trying to pursue. Also being Harass, and Dealing with the Mail System loosing His Mail, openning Legal Mail that has

happen once last Monday the 21st without His presence that Officer: Southwick is a Witness to. Plus going through Cell Searche's and Strip Search's with the taking of His personal property, throwing it away without giving plaintiff any option's for which He had to File a Tort Claim on that was in Olympia, And just being stressed out period by all these rule's here to follow; But most of all being locked up in a far away place long period's of time's in my cell without hardly any recreation time or free time out of my cell. Plus Plaintiff claims to have been loosing His hair, grinding his teeth, And Now plaintiff has a Severe Eye Damage that was caused by the W.S.P. Hospital Staff Member's that Plaintiff Now was told He'll have to live with for the rest of his life.

Towards the TRO Plaintiff is Suffering irreparably during the pendency of the Lawsuit if the Relief is Not Granted. Therefore plaintiff allege that there is No adequate remedy at Law and Future Compensation in Damages will be an insufficient remedy, and that plaintiff injuries now are of Serious Consequences to Him. Also plaintiff Due Process and Equal Protection Rights has been Violated that has caused irreparable harm, And also the diffrence in Segregation and being in population, is that in Segregation Plaintiff had No types of Activities for His Health or Mind to use. Plaintiff was Not afforded amy types of reading Materials, the food was worse, being cold before it reashes you for the facts that the prison guards had to bring it to you. You are only allowed to wear the same orange suit that is given, and only take one shower a day,

and only twenty minutes of phone time out of your cell period were as in population you have alot more movement, and activities of going to School, playing basketball, baseball, socker, jogging around the field, joing the music group, going to Church, and walking to get yourself a hot meal that you can get on your own. In Segregation all of your Life requirements are cut off, and your lefted with Nothing to do or No were to go or no one to talk too, Just left in the dark or with the lights on all Night long what ever the officer's may feel when they get to work. This is the Big Diffrence.

It is in the Public interest to grant Plaintiff a TRO of Preliminary injunction, therefore plaintiff Case Law is Stronger than the Law supporting the Defendants. However, Courts have continued to Act when overcrowding Reaches Serious proportions, especially when it is imposed for long periods of time and Accompanied by Severe Restrictions on Recreation, and out-of-cell time, by threats to Safety, or other Aggravating Conditions. This Approach is well illustrated by the Second Circuit's Decision in Lareau v. Manson 651 F.2d 96 (2d Cir.1981)

Plaintiff's hurting very deeply, And Now He's definetly using Medication from the cause of all the cruelties by Coyote Ridge Staff's and W.S.P. And M.S.C. Staff Members.

These I mentioned to the Court are the reason's that are very serious why the plaintif should be Granted a Large Amount of Compensatory Damage's, Punitive Damage's, and the Injuntive Relief,

and the Clearing of those Sanctions and written Statements against Him that's in His Central File's be Expunged and Cleared; with the transfer to Another Better Camp Facility closer to His Home and Family in Seattle.

The plaintiff aske the Court Respectfully to Serve His Claims upon all Mentioned Parties and to render the Nessarry Judgment's within the Court's discrection's the Court See's fit. I do believe since I have been already one year conduct clean and held at this cruel harsh facility, I have already earned back all of my status, except for the loss of my other 30 day's good time credits' and without any finances with all the daily effort I put into my claims, the valuable times spent, the long hours, and the Research's studied, and all the Money spent to send out legal work to the Court and refiling my claims as well.

Plaintiff also seek the cost's of being His own pro-sce Attorney, by the hour's rendered, and all that a Normal Attorney would do, but without a secretary or private investigator to help. All is done from plaintiff's own Accordance to that which best may serve him and the Court's to what is hopefully satisfiable. This is the extent of plaintif Complaint and Claim unless other wise NOted by the Court for further preperation's.

RESPECTFULLY NOTED, And SERVED

8). Also though Plaintiff dosent have Lt. Terry Waldher at the Heading of his complaint Plaintiff doe's have Lt. Terry Waldher Stated in His Second Amended Complaint, and in His Memorandum of

Support to His Amended Complaint of being the main factor to violating all the existing rule's regulation's policie's and proceedure's, and Constitutional Laws.

Therefore Defendant - Lt. Terry Waldher - Has Violated these Constitutions, And that Plaintiff willl also except by the Courts from Lt. Terry Waldher the Amount of One Million Dollars Forth With.

All the above partie's, have Violated each and every elment of these and other Constitution's That Plaintiff has Set Forth in His Second Amended Complaint, and His Memorandum of Support to His Second Amended Complaint; to Plaintiff's Equal Protection which Guarantee's Plaintiff's Due Process Rights to the Fifth Amendment of the United States Constitution's State and Federal. (Also the Eight and Sixth Amendment's as well that's an arguable subject in Plaintiff's Claim as well).

PLAINTIFF CONTEND's ALL IS TRUE AND CORRECT, EACH AND EVERY ELEMENT.

/s/_____
NORMAN GOTCHER JR. #634076/8w-A-2
Washington State Penitentiary
P. O. Box 520
Walla Walla: WA 99362

SUBSCRIBED AND SWORN to me before
this 19th day of August, 1993.
residing as a Notary Public at Walla Walla Prison.

/s/_____
NOTARY PUBLIC in and for the State of Washington

My Commission Expires: _____.

Supreme Court, U.S.
FILED
APR 11 1996
CLERK

NO. 95-1385

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TANA WOOD, ALAN WALTER, GARY EDWARDS, JULIUS VAN SKIKE, WAYNE HELGESON, TERRENCE LAWSON, RICH ALT,

Petitioners,

v.

NORMAN GOTCHER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TALIS MERLE ABOLINS
DANIEL J. JUDGE
JOHN SCOTT BLONIEN*
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April 1996

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A. Respondent's Release From Prison Underscores The Importance of Review.

In opposing the Petition, Respondent argues that *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995) does not present an important jurisdictional issue because he has been released. Respondent's Brief, at 5. Petitioner offers this reply. Respondent's release from prison has done nothing to mitigate the published *Gotcher* decision, which remains binding precedent for all district courts in the Ninth Circuit.[1]

Also, Respondent's release underscores the importance of the jurisdictional question presented. Respondent filed a civil rights action in which he claimed that "his **loss of good conduct time credits** and placement in disciplinary segregation constituted **compensable violations** of his due process rights", and sought unspecified injunctive relief. App. A-5; *Gotcher*, 66 F.3d at 1098. (Emphasis supplied). By focusing solely on the label of the pro se pleading, the Ninth Circuit failed to construe Respondent's challenge to lost good-time credits as a habeas corpus action. Under this analysis, Respondent has forever lost his ability to seek the earlier release from prison that his claims, if meritorious, would unquestionably have provided. Review of this case is important because *Gotcher* establishes a rule under which unsophisticated pro se litigants who logically desire an earlier release from confinement, will instead languish in civil rights actions because they were unable to explicitly specify a demand for early release.[2] *See* Schwartz, *The Preiser Puzzle:*

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[1]Although Petitioner has confirmed that Respondent has been released, this fact is not reflected in the record of the district court or the Ninth Circuit. It is not clear why Respondent has waited until this late hour to bring his release to the attention of a federal court.

[2]Washington provided Respondent with a clear expedited remedy for his challenge to his loss of good-time credits. Washington Rules of Appellate Procedure 16.9 and 16.11. Not only has Respondent lost this remedy, but the State is exposed to liability because its courts were not given any opportunity

Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 125-26 (1988). The obvious injustice of *Gotcher*'s jurisdictional rule warrants review.

Finally, Respondent incorrectly assumes that his release has no affect on his ability to seek monetary damages for lost good-time credits. This Court undermined this assumption in *Heck v. Humphrey*, 412 U. S. ___, 114 S. Ct. 2364 (1994). Under *Heck*, the Respondent's release precludes his now three-year old challenge to the 1992 disciplinary proceedings and sanction because he failed to exhaust the habeas remedies that were available to him after he received his disciplinary infraction. 114 S. Ct. at 2374 n.10 ("We think the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated."). Here, if the Respondent's interpretation of *Heck* in this case is correct, Gotcher's claim is barred. *Id.* at 2374 ("[A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.") (emphasis supplied).

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to expedite Respondent's release based upon the errors alleged in his "civil rights" lawsuit. See Petition, at 14, 16.

B. *Heck v. Humphrey* Neither Resolved Nor Addressed the Conflict and Confusion Stemming From *Wolff* and *Preiser*.

Respondent argues that "*Heck* clarified the meaning of *Wolff* very recently and the Petition shows no split of federal authority on it since *Heck* was decided." Respondent's brief at 6, citing *Wolff v. McDonnell*, 418 U.S. 539 (1974). However, *Heck* does not provide such clarification.[3]

Heck has provided a test for cases where, as in *Heck*, the civil rights claim will "necessarily" invalidate a criminal conviction. *Id.* at 2372. Because there was no question that Heck's challenge would have necessarily invalidated the fact of his confinement, the Court was able to resolve the claim based upon principles of tort law. The Court had no need to address the principles of federal-state comity that lie at the heart of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and the exhaustion requirement itself. *See Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996); *Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987).

Thus, *Heck* did not provide a simple test for cases, such as this one, that are likely to call a prisoner's loss of good-time credits into question. Unless review is granted, the federal courts will continue to struggle where the prisoner labels his complaint as a civil rights challenge to procedures, even though he directly challenges the result of the disciplinary hearing.

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[3]According to Respondent, *Heck* has clarified *Wolff v. McDonnell*, 418 U.S. 539 (1974), to allow him or any prisoner to circumvent habeas requirements by challenging the procedures of a specific disciplinary hearing, even though the Respondent also challenges the results of the disciplinary hearing through a prayer for damages and injunctive relief. Respondent's brief, at 6. In an unpublished decision, the Seventh Circuit explicitly recognized that there was "a debate" as to "whether (or how) *Heck* might apply in prison disciplinary cases." *Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished) (Posner, J., writing for the three-judge panel).

The Eighth Circuit concisely described the unique problem as follows:

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us **no answer to the concerns of federalism that cases such as this one raise.**

Offet, at 1259 (emphasis supplied); *see also Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1116 (5th Cir. 1987); *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992). Because Heck directly and necessarily challenged the outcome of his criminal trial, his case provides "no answer to the concerns of federalism" that cases such as Respondent's raise. *See Offet*, 823 F.2d at 1259.

Respondent's assertion that *Heck* has clarified the application of *Wolff* is further refuted by cases decided since *Heck*. *Miller v. Indiana Dept. Of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996); *Broussard v. Johnson*, ___F. Supp. ___, 1996 WL 115450, at 2 (E.D. Tex. 1996), *citing Serio*; *Richmond v. Duke*, 909 F. Supp. 626 (E.D. Ark. 1995). *See also Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished); *Cochrell v. Purkett*, 1996 WL 78179 (8th Cir. 1996) (unpublished); *Williams v. Godinez*, 1996 WL 124463 (N.D.Ill. 1996) (unpublished).

In *Miller*, an Indiana inmate brought a civil rights suit for damages, claiming that he was denied a classification that would have entitled him to good-time credits. Straining to avoid a conflict with *Gotcher* and *Armento-Bey v. Harper*, 68 F.3d 215 (8th Cir. 1995), the court incorrectly presumed that these civil rights claims went forward because the inmates "conceded that

the correctional system had reached the right result".[4] *Miller*, 75 F.3d at 331. Because Miller did not concede that his procedural challenge was harmless, his case was properly dismissed. *Id.* Here, the Ninth Circuit explicitly recognized Respondent's claim that the loss of good-time credits was itself a "compensable violation[]" of his due process rights. *Gotcher*, at 1098. If Respondent were in the Seventh Circuit, he would "not be able to use a suit for damages to get around the procedures that have been established for challenging the lawfulness of continued confinement." *Miller*, 75 F.3d at 331.

Similarly, in *Richmond*, the court noted the "basic dichotomy of *Heck*" between challenges that necessarily invalidate confinement, and challenges to procedures that are only allowed to proceed if they "would not be sufficient to undermine" the confinement. *Richmond*, 909 F.Supp. at 629. The court found it "difficult (though not impossible) to reconcile the decision in *Armento-Bey* with the dichotomy inherent in the *Heck* decision." *Id.* at n.8. The only way the court could achieve this reconciliation was by incorrectly assuming, like the Seventh Circuit in *Miller*, that Armento-Bey conceded that the procedural violation was harmless error. *Id.* Because it was "arguable" that Richmond's disciplinary sanction could not be allowed to stand, the court dismissed the claim. *Id.* at 633.

In *Williams v. Godinez*, the court reviewed a claim where the "plaintiff (sought) damages and injunctive relief that (did) not include restoration of good time". *Williams*, 1996 WL 124463, at 1. Despite this narrow request for relief, the court dismissed the case because "it is evident that any favorable ruling

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[4]The Seventh Circuit's attempt to distinguish these cases was unsuccessful because in *Gotcher* the inmate specifically claimed that "his loss of good conduct time credits . . . constituted compensable violations of his due process rights." App. A-5; *Gotcher*, 66 F.3d at 1098. Further, like Respondent, Armento-Bey never conceded that the loss of good-time credits was proper; he continued to claim damages for loss of good-time credits. *Armento-Bey*, 68 F.3d at 216.

would by implication entitle plaintiff to return of the good-time credits taken from him as a result of the disciplinary hearings." *Id.*

In *Cochrell*, the inmate alleged that he was unconstitutionally denied parole based upon his race. For relief, Cochrell merely sought a declaration that the Defendants' actions were unconstitutional, and to "enjoin (defendants') illegal and unconstitutional practices". *Cochrell*, 1996 WL 78179, at 1. The Eighth Circuit affirmed the district court because "the essence of Cochrell's claim was that his parole has been unconstitutionally delayed, and that he was attacking the duration of his confinement and seeking an immediate or speedier release." *Id.*

The foregoing decisions directly contradict Respondent's assertion that *Heck* has clarified the application of *Wolff* to prison disciplinary cases such as the one now before this Court. Until this issue is resolved, federal courts will continue to reach conflicting decisions on the jurisdictional question presented by prisoners who challenge such procedures.

C. The Existence of State-Created Liberty Depends on the Nature of the Interest Allegedly Created, Not the Presence of the Word "Serious" in a State Regulation.

The Petition addressed why the Ninth Circuit constitutionalized Washington's prison disciplinary system without determining whether loss of good-time credits imposes an "atypical and significant hardship". *See Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293, 2300 (1995). This sanction is not atypical; Petitioner demonstrated that prison officials may impose this sanction in response to a broad range of misconduct. Petition, at 22-23, and n. 11.

In response, Respondent urges this Court to ignore the range of misconduct sanctionable with a loss of good-time credits, arguing that such a review is irrelevant to the question of state-created liberty. According to Respondent, the Ninth Circuit has correctly identified *Wolff v. McDonnell*, 418 U.S. 539 (1974) as a case under which states will automatically create a liberty interest whenever the word "serious" is used to distinguish behavior that can result in a loss of good-time credits. Respondent's Brief, at 8-9.

Respondent's position further supports the appropriateness for review of *Gotcher*. In *Sandin* this Court explicitly criticized and rejected the constitutionalization of internal prison proceedings based upon a myopic focus on single words contained in state regulations:

> By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.

Sandin, 115 S.Ct. at 2299. Despite *Sandin*, Respondent argues that this Court does not sit to "save the states" from their use of the word "serious" as a category of prison misbehavior in a state regulation. Respondent's Brief, at 9. This Court's review is warranted to save the states from a published Ninth Circuit decision under which routine prison disciplinary proceedings will be constitutionalized merely because a state regulation contains the word "serious".

Like the Ninth Circuit, Respondent makes no argument that a loss of thirty days good-time credits presents a hardship that is "atypical and significant . . . in relation to the ordinary incidents of prison life", or "a dramatic departure from the basic

conditions" of his criminal sentence. *Id.* at 2300, 2301. Respondent does not dispute that loss of good-time credits may be given in response to a "wide range of misconduct", under the Washington regulations. *Id.* Respondent ignores the concerns expressed by this Court in *Sandin* that federal courts refrain from "the day-to-day management of prisons", and that they not create "disincentives for States to codify prison management procedures in the interest of uniform treatment." *Id.* at 2299.

D. Petitioner's Request For Review of a Binding and Published Decision is Not "Premature".

Respondent argues that it is too early for this Court to review *Gotcher* because (1) the case was decided on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and (2) the Washington prison disciplinary rules have recently been revised.

First, despite its procedural history, *Gotcher* is a published decision that has constitutionalized Washington disciplinary regulations as a matter of law whenever a loss of a good-time credit is at issue. App. A-11; *Gotcher*, 66 F.3d at 1100-01. Second, Respondent has not identified a single revision to the rules that would make a difference under the Ninth Circuit's conclusory analysis. The revised regulations still use the word "serious" to distinguish the two broad categories of infractions, and the Ninth Circuit has already held, without citation of authority, that Washington cannot expressly disclaim the creation of a liberty interest. App. A-11; 66 F.3d at 1100; *Cf. Jones/Seymour v. LeFebvre*, 781 F. Supp. 355, 359 (E.D. Pa. 1991); *Williams v. Kyler*, 680 F. Supp. 172 (M.D. Pa. 1986), *affirmed*, 845 F.2d 1019 (1988). Under these circumstances, review is not premature.

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E. Conclusion

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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